82-1147

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The court of appeals has construed a provision of a multiemployer collective bargaining agreement between an international labor organization and an employer association as requiring that all collective bargaining agreements of the international labor organization's constituent local unions include a clause calling for payment by employers into an industry fund.

The questions presented are:

(1) May such an agreement be held to be "price fixing" illegal *per se* under § 1 of the Sherman Act, notwithstanding the decisions of this Court beginning with *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, concerning the scope of *per se* rules of illegality and of the rule of reason in antitrust analysis?

(2) May such an agreement be found to be outside the labor exemption to the antitrust laws and violative of those laws (a) insofar as it applies to employers within the multiemployer bargaining unit in which it has been negotiated, or (b) insofar as it affects employers outside that unit, unless the international union was motivated by a predatory intent directed at the employers outside that unit?

PARTIES TO THIS PROCEEDING

The defendants in this action (who were appellants in the Court of Appeals), in addition to the petitioners, International Brotherhood of Electrical Workers (AFL-CIO) and its president, Charles H. Pillard, are National Electrical Contractors Association, Inc.; Robert L. Higgins; Colgan Electric, Inc.; Miller Electric Co.; H. E. Autrey, Allen L. Bader, Frank H. Bertke, Donald C. Cates, Robert W. Colgan, Joe R. Devish and Carl T. Hinote in their individual capacities and as Trustees of the National Electrical Industry Fund; Allan H. Stroupe, L. R. McCord, Aldo P. Lero and Lowell C. Timm, in their official capacities as Trustees of the National Electrical Industry Fund; and John Ostrow, C. W. Stroupe, Warren Losh and J. D. Hilburn, Sr., in their individual capacities.

The plaintiffs in this action (who were appellees in the Court of Appeals) are National Constructors Association and Commonwealth Electric Company, by and on behalf of themselves and all others similarly situated; The Howard P. Foley Company, by and on behalf of itself and all others similarly situated; Donovan Construction Company of Minnesota, Inc.; Arthur McKee & Company, Inc.; Badger America, Inc.; Catalytic, Inc.; C. F. Braun Constructors, Inc.; Dravo Corporation; Guy F. Atkinson Company; The H. K. Ferguson Company; Jacobs Constructors, Inc.; Pullman Kellogg Division of Pullman, Inc.; and Sterns-Roger, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, International Brotherhood of Electrical Workers ("IBEW") and the Union's president, Charles H. Pillard, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review that court's judgment of May 17, 1982, in *National Electrical Contractors Association et al. v. National Constructors Association, et al.*, Nos. 80-1808 and 80-1809.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which IBEW is affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of IBEW and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 678 F.2d 492 and is reproduced at pp. 1a-23a of the separately bound Appendix to this Petition ("A."). The order of the Court of Appeals denying rehearing is reported at 689 F.2d 1199 and is reproduced at A. 24a-25a. The opinion of the United States District Court for the District of Maryland is reported at 498 F. Supp. 510 and is reproduced at A. 26a-106a. The order of the district court is unreported and is reproduced at A. 107a-108a. The injunction issued by the District Court is unreported and is reproduced at A. 109a-110a.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1982. A timely request for rehearing or rehearing *en banc* was denied on September 8, 1982. On November 24, 1982 Chief Justice Burger entered an order extending the time for filing this Petition to and including January 7, 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves § 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1; §§ 6, 16 and 20 of the Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 17 and 26, 29 U.S.C. § 52; and §§ 8(b)(1)(B), 8(b)(3) and 8(d) of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. §§ 158(b)(1)(B), 158(b)(3) and 158(d). These provisions are set forth in the statutory appendix to this Petition at pp. 1b-4b, *infra*.

STATEMENT OF THE CASE

A. The Factual Background

This case involves the 1976 national collective bargaining agreement between the National Electrical Contractors Association ("NECA") and the IBEW, affecting labor relations in the electrical construction industry. A

clause in that labor agreement provides that employers shall pay up to 1% of their electrical labor payrolls into a national fund. The provision was implemented by its adoption into hundreds of local collective bargaining agreements. Payments into the fund were "to be used primarily to cover NECA's 'cost of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry'" (A. 32a).

The IBEW is an unincorporated international labor union, affiliated with the AFL-CIO. It has some 400 affiliated local unions in the construction industry, representing hundreds of thousands of construction workers.

NECA is an incorporated employers' association with 135 affiliated local chapters throughout the country. NECA's members regularly employ electrical construction workers under the terms of collective bargaining agreements negotiated with IBEW local unions. NECA's functions include providing training for supervisory employees (R. 100);[1] participation as the employer representative in the activities of the Joint Apprenticeship Training Program for the electrical construction industry (R. 281-2, 385-86); providing field representatives to assist in the day-to-day administration of local collective bargaining agreements (R. 270-3, 403-5); participation in the grievance settlement process on behalf of employers and participation as employer representative in the Council on Industrial Relations, a private quasi-judicial forum for settling labor management disputes in the electrical construction industry, see *Parks v. IBEW*, 314 F.2d 886, 894 (C.A. 4), *cert. denied*, 372 U.S. 976.

Collective bargaining agreements in the electrical construction industry have traditionally been negotiated on a local, multiemployer basis. In all but a few instances, the multiemployer bargaining agent has been a NECA chapter located in the jurisdiction of the contracting IBEW local union (A. 4a).

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[1] "R." refers to the printed record in the court of appeals.

By reason of the nature of the construction industry, NECA chapters, like other employer associations in the construction industry, have traditionally engaged in local collective bargaining that results in agreements binding not only on the electrical contractors who are their members, but also on contractors who are not members. (Those nonmember contractors will be referred to hereafter as non-NECA contractors.) This result comes about through the use of so-called "assents," which are short-form labor agreements by which the signatories bind themselves to the results of the employer association's bargaining.[2]

The ability of non-NECA contractors to take advantage, through the assent system, of local NECA-IBEW labor agreements is of great value to them since they can thereby rely on a ready pool of employees bound by agreements painstakingly negotiated by NECA chapters and the IBEW locals; they can bid confidently on projected work in reliance on wage rates and other cost terms which are fixed by the local labor agreement uniformly as to all affected contractors; they can rely on the ability to hire electricians who are trained in the apprenticeship and advanced programs operated jointly by NECA and the IBEW; and they can rely on the resolution of labor disputes by the processes and organizations operated by

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[2] In the electrical construction industry, there are three types of assents: The Letter of Assent "A", by which a contractor designates a local chapter of NECA to be its bargaining agent with an IBEW local union on an ongoing basis until timely termination, and adopts the existing local labor agreement; The Letter of Assent "B", by which a nonmember contractor agrees to abide by all terms of a specified local NECA-IBEW agreement, and all amendments thereto, and all successor agreements, until such time as the assent is cancelled by timely notice; and the International Agreement, a short-form agreement occasionally entered into by the International President of the IBEW with certain national "traveling" contractors who consistently operate in the jurisdictions of many IBEW locals. International Agreements have the same general effect as Letters of Assent "B" (A. 4a-5a).

NECA and the IBEW. Historically non-NECA contractors secured these advantages without paying any of the costs.

If non-NECA contractors do not desire to adopt the NECA-IBEW agreement, they are free to negotiate their own independent agreements with the IBEW locals (R. 782-5, 1365-1556). However, those contractors rarely choose to do so (A. 5a).

In 1975, the International President of the IBEW and the National President of NECA entered into negotiations looking toward the establishment of a national labor agreement which would bind their respective members, and would also bind assenting non-NECA contractors by being incorporated into local NECA collective bargaining agreements. The IBEW initiated the negotiations to obtain a nationwide increase in employer contributions to the nationally established pension fund for employees covered by IBEW agreements. In response, NECA demanded and obtained several concessions, including a favorable journeyman-to-apprentice ratio on construction jobs nationwide, a nationally standardized clause permitting the employment of electricians on a multi-shift basis with shift premiums rather than overtime payments, and a uniform management's rights clause (A. 5a).

NECA also proposed the creation of a National Electrical Industry Fund ("NEIF") and the insertion of a clause in local collective bargaining agreements whereby each employer party would pay up to one percent of his electrical labor payroll to the fund. This fund was patterned after comparable "industry funds" contained in thousands of construction industry labor contracts (R. 2241). One of its major purposes was to alleviate the burden on NECA's members caused by the prevalence of free riders—*viz.*, non-NECA contractors who benefit from NECA's services by assenting to local NECA-IBEW agreements. The fund was to be used to defray the costs of NECA's collective bargaining and administration of labor agreements, to provide support

for training of IBEW workers and for promotional efforts on the part of the electrical construction industry, which served the union's interest in preserving work opportunities for its members.[3] The contributions, to be determined by local bargaining, ranged from .2% to 1% of gross labor payroll; .2% was to be forwarded to NECA national headquarters for financing national NECA services and the balance of the contribution was retained by the local chapters for local services (A. 6a, n.5).

These proposals were ultimately adopted by the parties as the National Agreement. Its first paragraph states:

> The appropriate contents of this agreement and the enabling clauses herein shall be inserted in all agreements between the parties [the IBEW and NECA] and in all construction agreements between the local unions of the IBEW and the local chapters of NECA.

Provision for the NEIF was made in Article Six:

> The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.
>
> All construction agreements in the electrical industry shall contain the following language:
>
> > "Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calen-

[3] The Declaration of Trust for the NEIF limited expenditures to paying costs incurred by NECA in collective bargaining; paying expenses of employer representatives on the Council on Industrial Relations and NECA's costs in operating it as a forum to resolve industry labor disputes; providing training programs; providing other mutually beneficial services such as educational research, safety improvement programs and programs directed at promoting sound industry labor relations; advertising to promote work within the industry; and paying NECA's operating costs and expenses in the "administration and carrying out of the purposes" set forth above (R. 1655).

> dar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer" *(an amount not to exceed 1% nor less than 0.2 of 1%, as determined by each local chapter and approved by the trustees) (A. 5a-6a).[4]

The National Agreement was approved in December, 1976 to become operational on July 1, 1977. In the intervening period all then-existing local NECA-IBEW labor agreements were modified by the local parties to contain all of the nationally negotiated terms, including the NEIF provision (R. 729; 780). Thus, by the Spring of 1977, all NECA contractors, as well as those non-NECA contractors that had assented to the terms of local NECA-IBEW agreements, became bound to make payment into the NEIF beginning as of July, 1977.[5]

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[4] The term, "construction agreements", as used in the first and third paragraphs quoted above is a term of art. It refers to collective bargaining agreements entered into by IBEW local unions in its construction division, as distinguished from its other divisions.

[5] Non-NECA contractors that had not assented to local NECA contracts were not affected by the new NEIF provisions of those contracts. The IBEW had instructed its locals that they should only request such contractors, by *mutual consent*, to amend their agreements to provide for the NEIF, and that they were *not* to insist on such amendments (R. 782-85; 1834). The IBEW also instructed its locals that the NEIF provision was not required in new agreements with non-NECA contractors, and that if non-NECA contractors did not desire to assent to local NECA-IBEW agreements, the locals should negotiate in good-faith for alternative agreements that did not contain the NEIF (*Id.*). Numerous non-NECA contractors availed themselves of this option and by October, 1979, some 832 agreements with non-NECA contractors had been negotiated which did not contain the requirement of payment into the NEIF (R. 1560). However, the majority of non-NECA contractors continued to assent to local NECA-IBEW agreements.

B. Proceedings Below

In August, 1977, the National Constructors Associations ("NCA"), fourteen of its members, and an electrical contractor which was not a member of NCA, brought this action in the United States District Court for the District of Maryland. On September 9, 1980, the district court certified a plaintiff class consisting of approximately 800 non-NECA electrical contractors. On the same date, in response to cross-motions for summary judgment, the district court determined that Article Six of the National Agreement constituted "price fixing" and was illegal *per se* under § 1 of the Sherman Act. Invoking § 16 of the Clayton Act, the court enjoined further collection of NEIF payments from non-NECA contractors, whether or not they had assented to the contracts requiring such payments. The summary judgment was affirmed on May 17, 1982, by a two-judge majority of the United States Court of Appeals for the Fourth Circuit, consisting of Circuit Judge Widener and District Judge Michael, sitting by designation.[6] Circuit Judge Hall dissented, declaring that the majority's "blind ap-

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[6] The panel majority made a threshold factual finding that the indisputable meaning of Article Six was that the NEIF was required to be included "in all IBEW electrical construction contracts at issue here" (A. 9a). This finding was made despite clear evidence that the IBEW locals had entered into hundreds of agreements which did not include the NEIF, see p. 7, n.5, *supra*, and NLRB decisions rejecting charges (brought by NCA and other plaintiffs) that locals had insisted on the inclusion of provisions for such payment:

On October 7, 1977, NCA filed unfair labor practice charges against IBEW and twenty-three of its local unions, under §§ 8(b)(1)(B) & 8(b)(3) of the National Labor Relations Act, as amended, claiming that, pursuant to the National Agreement, the union had agreed to impose a nonmandatory subject of bargaining—NEIF payments—on all contractors in the electrical construction industry (R. 1657). After an extensive investigation of the union's conduct, the General Counsel of the NLRB refused to issue any charge based upon the agreement. The General Counsel's Office of Appeals upheld the decision, noting that "the International's policy at all times was to

plication of the *per se* rule against price-fixing . . . ignores the realities of this case, and as a consequence, reaches a manifestly inequitable result" (A. 20a).

REASONS FOR GRANTING THE WRIT

Introduction

In this case the court of appeals ruled: first, that a provision in the NECA-IBEW national multiemployer collective bargaining agreement should be read as requiring the inclusion in all IBEW construction industry collective agreements of a provision for a fund (the NEIF) established to pay the costs of the multiemployer collective bargaining negotiations, contract administration, apprenticeship training, and other related activity; and, second, that this agreement to secure such further agreements is price fixing *per se* illegal under the antitrust laws. The court of appeals theorized that a purpose of the antitrust laws, in general, and the *per se* rule against price fixing, in particular, is to preserve a "competitive advantage" (A. 15a) enjoyed by one group of competitors over another group of competitors in the same market by

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request, rather than insist, that the Industry Fund be included during negotiations with non-NECA contractors" (R. 1667).

The only charges that went to trial were against two local unions. These were consolidated before an Administrative Law Judge, who dismissed them after finding that the unions were not "unwilling to engage in good-faith bargaining for a contract without the NEIF . . . ." *IBEW Local Union No. 527* and *IBEW Local Union No. 716*, Case Nos. 23-CB-2075, 23-CB-2074 at p. 11 (May 31, 1979) (R. 1673). The charging party, NCA, filed no appeal.

Another complaint was filed against IBEW Local No. 12 by a union member who claimed that the union had unlawfully engaged in a strike and picketing because the employer had refused to accept the NEIF and that he had been unlawfully fined for continuing to work during the strike. The Administrative Law Judge found that the union was willing to bargain for a separate contract without the NEIF and dismissed the complaint. The NLRB adopted that decision as its own. *IBEW Local No. 12 (Commonwealth Electric Co.)*, 252 NLRB 245 (Sept. 18, 1980).

reason of the fact that both groups take advantage of a unique service performed by a trade association, but only the latter pays the cost of providing that service while the former takes a "free ride."

A salient feature of this Court's antitrust jurisprudence from *Continental T.V. Inc.* v. *GTE. Sylvania, Inc.*, 433 U.S. 36 (*"GTE Sylvania"*) to *Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (June 18, 1952) (*"Maricopa"*) has been a thoroughgoing review of the comparative costs and benefits of testing challenged practices by *per se* rules of illegality or by the rule of reason. As those decisions show, no antitrust question is of greater moment than the question of the proper scope to be accorded to each of these methods of analysis. *Maricopa* shows, too, that while there is much that is in dispute in this regard, there is also unanimous agreement that, where there "is price fixing only in a 'literal sense' " the *per se* rule against price fixing is not applicable. (*Id.* at 2479 quoting *Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (*"CBS"*); compare 102 S. Ct. at 2482-2483, Powell, J., dissenting). And it is beyond dispute that this Court's admonition that the utmost care be taken in distinguishing between practices that are properly labelled price fixing illegal *per se* and practices subject to the more discriminating analysis of the rule of reason is especially vital where the practice must be measured not against the antitrust laws standing alone but against the complex of rules designed to accommodate those laws and the national labor policy favoring collective bargaining. See *H.A. Artists & Associated Actors Equity Ass'n*, 451 U.S. 704, 713-716 (tracing the history of the "labor exemption".)

It is patent that the court of appeals in issuing the decision below proceeded in disregard of the leadings of this Court. That court committed all of the following errors in reaching its conclusion:

First, in its haste to affix the "price fixing" label to the provision challenged here, the court of appeals did

not pause even for a moment to undertake the critical analysis called for in *CBS* and *Maricopa*, that requires distinguishing between practices which only "literally "fix[]' a 'price' " and those "certain categories of business behavior to which the *per se* rule has been held applicable" (441 U.S. at 9).

Second, that court ignored the rule settled since *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6, 1898), aff'd, 175 U.S. 211 (1899) ("*Addyston Pipe*") and reaffirmed once again in *Maricopa* (102 S. Ct. at 2479-2480) that a single entity—whether a joint venture, a trade association or some other similar organization—that creates a unique product or provides a unique service may, without violating the antitrust laws, establish a uniform price for that product or service.

Third, that court, contrary to this Court's reasoning in *GTE Sylvania*, 433 U.S. at 55, treated the purpose of attempting to eliminate a "free-rider" effect as a purely anticompetitive purpose of the type subject to invalidation *per se*, rather than as a purpose to further the aims of the antitrust laws by alleviating the effects of a market imperfection, a purpose which justifies rule-of-reason analysis.

Fourth, that court, contrary to this Court's teaching in *GTE Sylvania*, 433 U.S. at 58-59, engaged in "formalistic line drawing" by differentiating between two practices indistinguishable in their economic effect: An association charging its members for a unique service produced by the association (which the lower court in its order treated as lawful) and an association charging the same price to nonmembers for the same service (which the lower court in its order enjoined as price fixing illegal *per se*).

Fifth, the court, contrary to the reasoning of *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481, indulged the assumption that, if a practice creates an added cost for certain competitors, that cost is automatically passed

on by each of those competitors in setting its own price for the sale of its product; on that patently false assumption the court of appeals held that such a practice tends to stabilize the prices charged by the competitors and is a form of price fixing illegal *per se*.

Sixth, that court, contrary to this Court's rulings in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 and *Mine Workers v. Pennington*, 381 U.S. 657, treated a multiemployer collective bargaining agreement provision that the union will seek the same collective bargaining agreement from all employers, as price fixing illegal *per se*, rather than as a provision that loses the "nonstatutory" labor exemption *if and only if* it is shown to be part of a conspiracy to drive certain competing employers out of a commercial market.

Finally, that court, contrary to *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, and its predecessors, which recognize that the labor law favors the stabilization of multiemployer bargaining relationships, improperly applied the antitrust laws to excuse certain members of a multiemployer bargaining unit from the obligation to comply with terms of the collective bargaining agreement covering that unit.

These are not small errors, nor do they produce only the isolated effect of an erroneous judgment in this case. Looking at this case solely from the antitrust perspective, the court of appeals' decision radically expands the class of practices subject to invalidation under the *per se* doctrine and correspondingly narrows the class of practices subject to rule-of-reason analysis. That result is fundamentally inconsistent with this Court's recognition that "the rule of reason [is] the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act" (*GTE Sylvania*, 433 U.S. at 59). And, as we noted at the outset, this expansion is accomplished by uncritically applying the label "price fixing" to the practice challenged here—not to further free competition in the classical sense, but to maintain a "free-

rider" effect that benefits one group of *competitors* in a market. This evinces a total misunderstanding of the purposes of the antitrust laws. As the Court stressed in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488: "The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States*, 370 U.S. [294] at 320" (emphasis in original).

Moreover, this case is not one in which the legality of the challenged practice is to be judged solely by measuring that practice against the norms stated in the antitrust laws. The agreement invalidated in part here is a multiemployer collective bargaining agreement. Every decision of this Court from *Apex Hosiery* to the present demonstrates that the agreement, insofar as it sets the price for labor to be paid by electrical contractors who are within that bargaining unit, is within the labor exemption to the antitrust laws and not illegal *per se* under those laws. And, to the extent that the decision below turned on the effect of the NECA-IBEW collective agreement outside the covered bargaining unit, *Pennington* shows that such effects standing alone are not sufficient to remove the labor exemption. Thus, viewed in this broader context of the proper accommodation of the antitrust and labor laws, the decision below is even more incompatible with the principles established by this Court.

I. The Decision Below That Petitioners Engaged in "Price Fixing" Which *Per Se* Violates the Sherman Act Is Fundamentally Inconsistent With the Decisions of This Court

A. The courts below decided this case on the theory that Article Six of the NECA/IBEW agreement (as they construed it) is a price-fixing agreement *per se* illegal under § 1 of the Sherman Act. This conclusion was fundamental error as shown by the analysis of the *per se* concept in *CBS* and *Maricopa*.

In *CBS*, the Court of Appeals for the Second Circuit had held that issuance by two organizations (ASCAP and BMI) to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by those parties was price fixing *per se* unlawful under the antitrust laws (see 441 U.S. at 4, 6). This Court disagreed with that conclusion. Observing that "easy labels do not always supply ready answers" (*id.* at 8), the Court's opinion emphatically rejected the court of appeals' analysis of the issue:

> To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a short-hand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd, 175 U.S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter. [441 U.S. at 8-9, footnotes omitted]

As a result of this examination of the blanket licensing practice the Court concluded that the practice did not fall within the category to which the label *per se* "price fix-

ing" should apply and directed it be evaluated under the rule of reason (441 U.S. at 10-25).[7]

In *Maricopa* the question presented was "whether § 1 of the Sherman Act, * * * has been violated by an agreement among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services provided to policy-holders of specified insurance plans" (102 S. Ct. at 2469). Each of the two defendant medical societies had established a foundation, composed of doctors, to "perform[] three primary activities":

> It establishes the schedule of maximum fees that participating doctors agree to accept as payment in

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[7] In *Addyston Pipe & Steel*, the *locus classicus* cited in *CBS*, Judge (later Chief Justice) Taft wrote as follows concerning the common law, whose concept of restraint of trade was read into the Sherman Act:

> . . . [W]hen two men became partners in a business although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members with a view of securing their entire effort in the common enterprise, were of course, only ancillary to the main end of the union, and were to be encouraged. [85 Fed. at 280]

But in contrast Judge Taft also wrote:

> [W]here the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster. [85 Fed. at 282-283]

> full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance company accounts to pay doctors for services performed for covered patients. [102 S.Ct. at 2470-2471]

The antitrust suit did not challenge the foundation's "peer review or claim administration functions," and the foundation did *not* "allege that these two activities make it necessary for them to engage in the practice of establishing maximum fee schedules." (*Id.* at 2471). The Court held that the agreement to set maximum fees constituted a classic restraint by competitors on the prices that each would charge for his services, and was thus subject to the *per se* prohibition against price fixing. The Court "declined the [defendants'] invitation to cut back on the *per se* rule against price fixing" and then turned to their argument, based on *CBS*, "that their fee schedules involved price fixing in only a literal sense." (*Id.* at 2479.) The Court's response reaffirmed CBS' disapproval of a literalistic approach to price fixing and differentiated between *CBS* and *Maricopa* on grounds which compel the conclusion that the *per se* rule is inapplicable here.

The *Maricopa* opinion explained that the "blanket license" in *CBS* was entirely different from the product that any one composer was able to sell by himself" and a "necessary consequence" of its creation "was that a price had to be established" (*id.*, quoting 441 U.S. at 21). Thus, "the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a 'literal sense.'" (*Id.*, quoting 441 U.S. at 8.) But the agreement in the *Maricopa* case was found to be "fundamentally different":

> Each of the [defendant] foundations is composed of individual practitioners who compete with one another for patients. * * * The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care. [102 S.Ct. at 2479]

The difference between agreements such as that in *CBS* on the one hand, and agreements by which competitors combine to fix the prices of their own services as in *Maricopa* is, as this Court demonstrated in the last paragraph of the latter opinion, basic to antitrust law. The Court distinguished "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss and profit" and which are "regarded as a single firm competing with other sellers in the market" from the *Maricopa* agreement among "hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." (102 S. Ct. at 2479-2480). The Court concluded:

> [I]f a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price fixing mold. [Id. at 2480] [8]

An agreement which provides that all contractors shall pay a specified amount to the NEIF is indistinguishable from that in *CBS*, and bears no resemblance to the horizontal price-fixing cartel in *Maricopa*. The services of NECA and its chapters for which that payment is

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[8] See also *Addyston Pipe & Steel*, quoted at p. 15, n.7, *supra*.

made are as unique as the blanket licenses. No single contractor, be it a member or nonmember of NECA can bargain with IBEW on a multiemployer basis, or administer the resulting multiemployer agreements, or operate the resulting multiemployer apprenticeship and advanced training programs together with IBEW and its locals as provided in those agreements. While electrical contractors, be they members or nonmembers of NECA, compete with each other in the market for the sale of their contruction services, the IBEW/NECA agreement by its terms does not establish the price of those services.

B. The courts below have not determined that the services performed by NECA are illegal, or that nonmembers of NECA do not benefit from those services. And it is clear that these services cannot be performed unless the costs are borne by someone.[9] Those courts have held, rather, that the antitrust laws require that non-NECA contractors be relieved of those costs, which are to be borne exclusively by NECA contractors. But the elimination of "free-rider" effects, which the courts below regarded as an anticompetitive purpose, calling for *per se* invalidation of the 1% contribution, was considered by this Court to be one of the justifications for the restraint at issue in *GTE Sylvania*, where the *per se* doctrine of *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365, was disapproved.

Precisely because free-rider situations reflect a "market imperfection[]" (433 U.S. at 55) rather than the proper workings of competitive markets, the Seventh Circuit recently observed that "antitrust law increasingly is tolerant of contractual arrangements that reduce free-

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[9] In this respect, too, the circumstances of the present case differ from those in *Maricopa* where it was undisputed that the defendant foundations could carry on their lawful peer review and claim administration functions without establishing maximum fee schedules (102 S. Ct. at 2471).

rider problems and thereby increase competition * * *. See, *e.g.*, *United States Trotting Ass'n v. Chicago Downs Ass'n Inc.*, 665 F.2d 781, 789 (C.A. 7 1981) (*en banc*)[10];

[10] The *United States Trotting Ass'n* case is especially instructive. The Association ("USTA"), whose members included, *inter alia*, race tracks and horse owners, registered standardbred horses, maintained records of registration certificates and provided eligibility certificates for use in selecting balanced race fields. Nonmembers of USTA could obtain such certificates by affiliating as "contract tracks" and paying to use USTA's services on the same basis as member tracks (see 665 F.2d at 783-784). Two race tracks, which neither joined USTA nor contracted to buy its services,

> continued to hold races with USTA-registered horses and to use the information contained on USTA registration and eligibility certificates. Both continued to provide USTA with information about racing performances by forwarding Judge's Sheets to USTA headquarters. Each of the defendants thus enjoyed a paradigmatic "free ride," receiving all of the benefits of USTA affiliation with none of the attendant costs. [665 F.2d at 784]

USTA then informed its members of its intention to invoke certain sanctions against the nonpaying tracks, whereby it would provide no services to them and would enforce USTA's rules which forbade its members from racing horses at those tracks (665 F.2d at 784-785). One of the nonpaying tracks asserted that the enforcement of those rules would be a group boycott *per se* violative of § 1 of the Sherman Act, and the district court agreed, permanently enjoining USTA from " 'preventing its members from racing at tracks which are not USTA members or have not paid USTA a specified fee.' " (*Id.* at 787, quoting 487 F. Supp. 1008, 1017). The court of appeals, sitting *en banc*, reversed. In rejecting *per se* treatment that court reasoned:

> Except in the rare instances where conduct is unambiguously anticompetitive, [our] lack of experience should lead us to inquire into the nature and idiosyncracies of a particular enterprise before we assign a label to its conduct. One indication of the inconcinnity between the state of our knowledge and the certitude of the *per se* rule is the extent to which the rule minimizes USTA's free-rider problems. If Fox Valley can enjoy the benefits of affiliation with USTA and pay nothing, or pay only when a court orders it to do so, it has no incentive to do otherwise. And it can count on the breadth of USTA membership and on the relationship between USTA and state

Muenster Butane Inc. v. Stewart Co., 651 F.2d 292, 297 (C.A. 5 1981)." *USM Corp. v. SPS Technologies, Inc.*, CCH 1982-83 Trade Cases ¶ 65,077 (C.A. 7, December 3, 1982). See also *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1200-1201 (C.A. 6, 1982).

Indeed, it has long been settled that even an association which has violated the Sherman Act by excluding competitors from a beneficial arrangement may lawfully condition the competitors' participation on their payment of a fair share of the cost of the service. *United States v. St. Louis Terminal Railroad Association*, 224 U.S. 383. See also *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1386-1387 (C.A. 5). And, as we have seen, in *U.S. Trotting Ass'n*, the Seventh Circuit approved the imposition of a fee on nonmembership of an association for service performed by the association from which the nonmembers also benefited. Yet, while the latter case explicitly, and in *St. Louis Terminal* and its progeny implicitly, have recognized the equity and antitrust legality of eliminating free riding by nonmembers of an association, the courts below have held that the antitrust laws require that NECA give nonmembers a free ride.

GTE Sylvania rests on the more general proposition "that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." (433 U.S. at 58-59.) In deciding the present case, the court below engaged in just such "formalistic line drawing" as was disapproved in *GTE Sylvania*. The injunction entered by the District Court, and affirmed in this respect by the Court of Appeals, enjoined the defendants from applying "Article 6 of the National Agreement . . . as to any per-

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racing boards to keep USTA afloat for some time despite its (and other tracks') free-riding attempts. In treating USTA's efforts to forestall this result as *per se* violative of the Sherman Act, the district court forecloses all justifications USTA might make, perhaps without achieving any procompetitive result. [665 F.2d at 789, footnotes omitted]

son, corporation, or other entity which is not a member of the National Electrical Contractors Association" and from "demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund" (A. 17a). Drawing a line between competitors operating in a single market on the basis of their membership or nonmembership in an association makes no more sense in terms of the purposes of the antitrust laws than did the *Schwinn* distinction between transactions in which title passes and those in which title does not pass.[11]

C. The courts below rested their determination of *per se* illegality on the ground that, in the court of appeals'

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[11] In sustaining the injunction with respect to all non-NECA contractors, even if they voluntarily agreed to contribute to the NEIF, the court misapplied and misunderstood yet another antitrust precedent—*Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134. The court of appeals reasoned that "to deny non-NECA employers relief although they may have previously voluntarily assented to a NECA-IBEW agreement would be to deny recovery to a party which was *in pari delicto*, contrary to the holding in *Perma Life*" (17a-18a). The court thereby misconstrued the significance of the voluntariness of non-NECA contractors' action in assenting. Such voluntary action does not, we recognize, preclude recovery by assenting contractors on the equitable grounds addressed and disallowed in *Perma Life*. Rather, such voluntariness demonstrates the lack of any injury or threatened injury flowing from Article Six of the National Agreement. For, if the purported illegality of Article Six inheres in its *requiring* NEIF language in the local labor contracts of nonmembers of NECA (A. 9a) and its "*rob*[*bing*] them of a competitive advantage" (A. 15a) (our emphasis), relief should be extended only insofar as such contractors have been or will be "required" and "robbed", and not insofar as they voluntarily have agreed—or will agree—to adopt local labor contracts including NEIF provisions. Prohibiting the maintenance of the NEIF provisions in local labor agreements of all non-NECA contractors would only be justified if the NEIF were in and of itself illegal, which the courts below have not held, or if there were evidence, which there is not, that those local agreements were, in fact, adopted as a result of coercion.

pejorative description, "taking the additional 1% of labor costs from non-NECA contractors * * * robs them of a competitive advantage beneficial to the public." (A. 15a)

Such rhetoric is an insufficient substitute for the thoughtful analysis of a challenged practice required by this Court's decisions. Even if it were proper to assume that the agreement has adverse effects on competition in the market for electrical services (and we shall show that it may not be so assumed), the agreement would not necessarily be subject to *per se* invalidation.

As the Court recently explained, the earliest of cases applying the rule of reason upheld a covenant by a seller of a bakery not to compete with a purchaser of his business "as reasonable, *even though it deprived the public of the benefit of potential competition.*" *National Soc. of Professional Engineers v. U.S.*, 435 U.S. 679, 688-689 (emphasis added), discussing *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).[12]

Of course, as the *Professional Engineers* case also teaches (and *Maricopa* reaffirms), the rule of reason does not apply to an agreement among "competitors * * * to sell their goods at the same price as long as their price is reasonable." (435 U.S. at 689). However, the courts below did not and could not construe the IBEW—NECA agreement as one which by its terms fixes the price at which the competing electrical contractors would sell electrical construction services. Rather, those courts

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[12] In *Mitchel* the "long-run benefit of enhancing the marketability of the business itself * * * outweighed the temporary and limited loss of competition" (435 U.S. at 689). So too, although the necessary effect of any agreement which denies to one or more competitors a free ride at the expense of other competitors is to eliminate the competitive advantage which the former would enjoy if they could avoid the cost of paying for the service, it has generally been understood that "contractual arrangements [which] reduce free-rider problems * * * increase competition" (*USM Corp.*, quoted at pp. 18-19, *supra*).

determined, again in the court of appeals' words, that the "industry fund would tend to stabilize the price of electrical construction contracts, a practice illegal *per se* under the Sherman Act" (A. 15a-16a).

But the conclusion that the agreement would have the tendency to stabilize prices in the electrical construction market is fundamentally flawed. Since the case was decided on summary judgment, without any evidence concerning the operations of the market for electrical construction services, the "tendency to stabilize" conclusion necessarily rests on the unarticulated premise that a change in costs at one level is necessarily reflected in a change in price at the next level. Precisely that theory was deemed fallacious by this Court when it rejected the passing-on defense in Sherman Act suits:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. [*Hanover Shoe v. United Shoe Machinery Co.*, 392 U.S. 481, 492-493] [13]

D. In sum, the simplistic approach of the courts below, which equates eliminating a cost differentiation between competitors and price-fixing in the market in which those competitors sell their products, is bad economics and bad law.

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[13] It may be that a trial would show that in some or all segments of the market for electrical construction services "the additional 1% labor costs" (A. 15a) are automatically passed on to the purchaser of those services rather than absorbed by the contractor. In such a situation, the "'cost-plus' contract" exception recognized in *Hanover Shoe* (392 U.S. at 494) would be applicable to any damage claim.

We cannot identify all the economically useful practices which are jeopardized by the court of appeals' analytical leap to the proposition that cost equalization is price fixing illegal *per se*. But the effect of the decision is brought into focus by noting that the following decisions, previously discussed in this section, would have different results under the court of appeals' rationale: *CBS* would certainly have to be decided differently, because the blanket license which was there sustained established the cost of all those who wished to use the musical compositions. That cost (which CBS sought to lower by the litigation) undoubtedly had an impact on the price which CBS and competing networks charged for advertising on programs in which such music was used. Moreover, under the court of appeals' approach, the defendant in *U.S. Trotting Ass'n.* would not have been able to continue to charge non-member racetracks for the use of its services (see pp. 19-20, n.10, *supra*). Indeed, all arrangements which seek to remedy the "free-rider" problem by imposing a uniform cost on competitors would be illegal *per se* under the court of appeals' theory. Consequently, the practice which the decrees in cases such as *St. Louis Terminal Co.* and *Realty Multi-List* (p. 20, *supra*) expressly permitted, and which the Justice Department in the latter case successfully proposed as the remedy for the defendant Brokers' Association's illegal boycott (see 629 F.2d at 1359, n.17, and 1360), would be forbidden.

II. The Decision Below Is Inconsistent With the Decisions of This and Other Courts Concerning the Interrelationship Between the Antitrust Laws and the Labor Laws, and Would Undermine the Congressional Decision to Preserve Multiemployer Bargaining

A. To this point we have accepted the hypothesis that this is a case concerning the antitrust rules that govern commercial markets. In fact, however, this case concerns a labor market price set for the work done by workers covered by the local NECA-IBEW multiemployer collective bargaining agreements after the give and take be-

tween the parties that is part and parcel of the bargaining process. It has been settled since *Apex Hosiery Co. v. Leader*, 310 U.S. 469, that, far from constituting a *per se* antitrust violation, a collective bargaining agreement fixing that price is within the "nonstatutory" exemption to the antitrust laws. This Court most recently restated the law in this regard in *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622:

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.

The Court has, to be sure, recognized one limit on the freedom to negotiate the price of labor through collective bargaining:

> One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. [*Mine Workers v. Pennington*, 381 U.S. 657, 665-666]

Aside from the instant decision, the uniform understanding of the *Pennington* rule in the courts of appeals is that stated in *James Snyder Co. v. Associated Gen. Contr. Etc.*, 677 F.2d 1111 (C.A. 6) *cert. denied*, —— U.S. ——, 51 L.W. 3378 (Nov. 15, 1982). In their complaint in that case "plaintiffs alleged that defendants had conspired with the bricklayers' and laborers' unions to impose the multi-trade/multi-employer collective bargaining agreement's terms upon smaller non-signatory employers in an attempt to drive them out of business in violation of sec-

tion 1 of the Sherman Act" (677 F.2d at 1118). After a painstaking analysis of the decisions of this Court and of the other courts of appeals, the Sixth Circuit held "that plaintiffs in the present case had the burden of proving first that defendants and unions agreed to impose wages upon plaintiffs, and second that defendants entered into this agreement with the intent to injure the plaintiffs' businesses, *i.e.*, with predatory intent" (677 F.2d at 1120).

The Fifth and Seventh Circuits have also held that proof that the union was motivated by a predatory intent is a necessary element for making out a *Pennington* claim. *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*, 504 F.2d 896, 903 (C.A. 5); *Associated Milk Dealers, Inc. v. Milk Drivers' Local 753*, 422 F.2d 546, 554 (C.A. 7).

The courts below denied petitioners the benefit of the labor exemption without a trial and without making this requisite finding of predatory intent. And, of course, a plaintiff who shows that intent has *not* proved a *per se* antitrust violation, but only that the nonstatutory exemption does not apply. "[I]t is clear that denying the exemption does not mean that there is an antitrust violation," *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 61. See also *Connell Co., supra*, 421 U.S. at 637; *National Gerimedical Hospital v. Blue Cross*, 452 U.S. 378, 393, n.19.

B. The decision below upsets the accommodation which *Pennington* and the decisions of other circuits just cited have made between the policies of the antitrust laws and of the labor laws with respect to multiemployer bargaining not simply in one respect but in two. In *Pennington* the forfeiture of the labor exemption was predicated on the fact that "the union and the employers in one bargaining unit" had "bargain[ed] about the wages, hours and working conditions of other bargaining units" (381 U.S. at 666). But the decision below denied the labor

exemption to an agreement even insofar as the agreement affected members of the multiemployer bargaining unit in which the agreement was made. For that decision relieved members of such a unit from complying with one of the terms their bargaining agent had negotiated and, indeed, enjoined compliance with such terms.[14]

This result cannot be squared with Congress' policy, which favors the stability of multiemployer bargaining units. That policy, which appears to underlie *Pennington's* recognition of "the duty to bargain unit by unit", and the aforementioned limitation of its holding to agreements that reach beyond the bargaining unit, was most recently reaffirmed by this Court in *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404. The Court there approved the Board's

> rules, which reflect an increasing emphasis on the stability of multiemployer units, permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is "mutual consent" or "unusual circumstances" exist. [454 U.S. at 410-411, quoting *Retail Associates, Inc.*, 120 NLRB 388, 395.]

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[14] Assent A holders have been expressly found by the NLRB to be members of the local NECA multiemployer bargaining unit, with NECA as their bargaining agent, whether or not they are members of NECA. *McCormick Electrical Construction Co.*, 240 NLRB 418 (1979). Indeed, even the Fourth Circuit acknowledged this to be the law (A. 4a).

Assent B and International Agreement holders, while not giving express ongoing bargaining authority to NECA, confer limited authority for purposes of NECA's negotiating amendments to any existing agreements and are bound by those amendments. Thus, they are functionally members of the unit to that extent. See *Arco Electric Co.*, 237 NLRB 708 (1978), *aff'd*, 618 F.2d 689 (C.A. 10, 1980).

In *Bonanno Linen* the Court reiterated its recognition in *NLRB v. Truck Drivers*, 353 U.S. 87 (*Buffalo Linen*) that

> at the time of the debates on the Taft-Hartley amendments, Congress had rejected a proposal to limit or outlaw multiemployer bargaining. The debates and their results offered "cogent evidence that in many industries multiemployer bargaining was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." [454 U.S. at 409, quoting 353 U.S. at 95]

In Congress, the unsuccessful opponents of multiemployer bargaining had stressed what they considered to be its "monopolistic" nature and adverse effect on competition. See 1 Legislative History of the Labor Management Relations Act 1497 (GPO 1948) pp. 326-327, 672-673, 676, 759-760; 2 *id.*, p. 1492. Congress, however, ultimately rejected these views and instead permitted industrywide bargaining on a voluntary basis while forbidding (in § 8 (b) (1) (B)) labor organizations from coercing employers to join multiemployer or industrywide units, see *NLRB v. Amax Coal Co.*, 453 U.S. 322, 327.

The decision below reverses the congressional judgment. Even if its holding applies only to nonmandatory subjects of bargaining—and the court below refused so to limit its decision (A. 18a)—this holding would seriously undermine the viability of multiemployer bargaining. The prospect that some members of the unit could evade the terms negotiated on behalf of all, and thus obtain a competitive advantage over the others—precisely the policy which the court below, contrary to Congress, sought to further by its decision—would severely inhibit multiemployer negotiations concerning any subject not clearly established to be mandatory. And of course, the fear of treble damage liability would overhang the entire negotiations. Yet, bargaining over permissive subjects is an accepted and useful part of the process, see *Labor Board v. Borg-*

Warner Corp., 356 U.S. 342, 349; *Oil, Chemical and Atomic Workers International Union, Local 3-89 v. NLRB*, 405 F.2d 1111 (CA DC, Burger, J.)

In sum, the decision below (1) is inconsistent with *Pennington*—the major decision of this Court which establishes the scope of the labor exemption to the antitrust laws in the context of multiemployer bargaining, (2) conflicts with the decisions of three other courts of appeals concerning a critical element of proof of a *Pennington* violation; and (3) undermines the multiemployer bargaining process despite Congress' determination to preserve it. A decision of a court of appeals which has such a seriously adverse impact on the national labor policy, and which so sharply departs from precedent and sound analysis under the antitrust laws, should not be permitted to stand.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

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STATUTORY APPENDIX

STATUTES INVOLVED

The Sherman Anti-trust Act, 26 Stat. 209, 15 U.S.C., §§ 1 *et seq.*, provides in pertinent part as follows:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: • • •

The Clayton Act, 38 Stat. 730, 15 U.S.C. §§ 12 *et seq.*, 29 U.S.C. § 52, provides in pertinent part as follows:

> § 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
>
> § 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction, improvidently granted and a showing that

the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *.

§ 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall

any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

The National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.*, provides in pertinent part as follows:

> § 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
> >
> > * * * *
> >
> > (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of the Act;
>
> § 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later

* * * *

82-1147

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, (AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 80-1808, 80-1809

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,
Defendants-Appellants,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Plaintiffs-Appellees.

Argued March 3, 1981

Decided May 17, 1982

Stanley D. Robinson, New York City (Kaye, Scholer, Fierman, Hays & Handler, New York City, on brief), James P. Garland, Anthony W. Kraus, Nora Winay, Semmes, Bowen & Semmes, Baltimore, Md., Laurence J. Cohen, Richard M. Resnick, Sherman, Dunn, Cohen, Leifer & Counts, Baltimore, Md., Milton Handler, Michael Malina, New York City, Peter H. Gunst, Mary K. Farmer, Frank, Bernstein, Conaway & Goldman, Baltimore, Md., Guy Farmer, Washington, D.C. (Farmer, Wells, McQuinn, Flood & Sibal, Washington, D.C., on brief) and Donald M. Barnes, Washington, D.C. (Earl W. Kintner, Dennis C. Cuneo, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., on brief), for defendants-appellants.

Wilbur D. Preston, Jr., Baltimore, Md. (Robert M. Wright, Gerson B. Mehlman, James R. Chason, Whiteford, Taylor, Preston, Trimble & Johnston, Baltimore, Md., on brief), Alan D. Cirker, Washington, D.C. (Anthony J. Obadal, Zimmerman & Obadal, Washington, D.C., Ira Genberg, Stokes, Shapiro, Fussell & Genberg, Atlanta, Ga., on brief), for plaintiffs-appellees.

K. L. Estabrook, Donald F. Nicolai, Lindabury, McCormick & Estabrook, Westfield, N.J., on brief, for amicus curiae Mechanical Contractors Ass'n of America, Inc.

John P. Frank, Lewis & Roca, Phoenix, Ariz., on brief, for amicus curiae NECA, Pipe, and Masonry.

Robert J. Fenlon, Stephen J. Burton, Felhaber, Larson, Fenlon & Vogt, St. Paul, Minn., on brief, for amicus curiae The Sheet Metal and Air Conditioning Contractors Nat. Ass'n, Inc.

J. Albert Woll and Laurence Gold, Washington, D.C., on brief, for amicus curiae The American Federation of Labor and Congress of Industrial Organizations.

Jerry J. Williams, Keith B. Bardellini, Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch, Beverly Hills, Cal., on brief, for amicus curiae Const. Industry Advancement Fund of Southern California, Fund for Const. Industry Advancement, San Diego Const. Industry Advancement Fund, and Associated Gen. Contractors, San Diego County, Inc.

Before WIDENER and HALL, Circuit Judges, and MICHAEL, District Judge.*

WIDENER, Circuit Judge:

The National Electrical Contractors Association, the International Brotherhood of Electrical Workers, and other defendants appeal the award of a permanent injunction to plaintiffs who include the National Constructors Association and numerous construction companies, after a finding that the actions of the defendants amounted to price fixing illegal under § 1 of the Sherman Act, 15 U.S.C. § 1. *National Constructors Association, et al. v. National Electrical Contractors Association, Inc., et al.*, 498 F.Supp. 510 (D.Md.1980). This appeal is taken under

* United States District Court for the Western District of Virginia, sitting by designation.

28 U.S.C. § 1292(a)(1) permitting appeals from the award of injunctive relief. A FRCP 54(b) certificate was entered by the district court relating to the counterclaims. We affirm, and modify the injunctive order only slightly.

This case involves a private antitrust action for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, and damages under § 4 of that Act, 15 U.S.C. § 15, for a violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1] The plaintiffs below, appellees here, are the National Constructors Association (NCA), an unincorporated trade association made up of companies who perform electrical construction work and transact business in the electrical construction industry, and other corporations performing electrical contracting work which employ IBEW electrical workers.[2] The defendants below, appellants here, are the National Electrical Contractors Association (NECA), an incorporated trade association, whose members perform electrical construction work; the International Brotherhood of Electrical Workers (IBEW), an unincorporated labor union representing electrical workers throughout the country; Charles H. Pillard, President of IBEW International; Robert L. Higgins, Executive Vice President of NECA; Miller Electric Co. and Colgan Electric Co., corporations engaged in electrical contract-

[1] § 1 of the Sherman Act provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

[2] The district court has certified a class of plaintiffs as those electrical contractors who, since July 1, 1977 have not been members of NECA and who perform electrical construction work using workers obtained or employed under the terms of collective bargaining agreements with locals of the IBEW, which agreements contain or incorporate by reference the terms of Article 6 of the NECA-IBEW national agreement.

The plaintiffs/appellees may be referred to as NCA or as appellees.

ing work and members of NECA; and the trustees of the National Electrical Industry Fund.[3]

NECA is the largest trade association in the electrical contracting industry, consisting of at least 133 local trade associations or chapters whose members are both union and non-union electrical contractors. The IBEW is the largest union representing electrical workers, representing the vast majority of all of the organized electrical workers in the nation. At the time of the district court's order the members of NECA performed slightly more than 50% of the electrical contracting work in the nation. Since 1960 NECA members have performed between 50 and 60% of such work. Because of their respective positions, much of the collective bargaining in the electrical contracting industry is done by IBEW and NECA. Local chapters of NECA are assigned territories throughout the country which coincide with the jurisdiction of one or more of the more than 400 IBEW locals. The local chapters of NECA act as multi-employer bargaining representatives and negotiate local collective bargaining agreements with the local IBEW unions. Individual electrical contractors who are not members of NECA usually enter into a labor agreement with the IBEW in one of several ways: (1) Letter of Assent—A—An "A" Letter of Assent authorizes the local NECA chapter to act as the collective bargaining representative for the employer in negotiations with the local union. As such, the employer is, of course, considered a member of the NECA chapter bargaining unit. (2) Letter of Assent—B—A "B" Letter of Assent binds the employer to the terms of the local IBEW-NECA collective bargaining agreement and all approved amendments, but does not make the employer part of the bargaining unit. (3) International agreements—Designed for employers operating on a national basis, such an agreement binds the employer to the terms of local

[3] The defendants/appellants may be referred to as NECA or as the appellants.

union contracts in the areas in which the employer performs work. (4) Project agreements—These agreements apply to a single construction site and contain any provisions that may be agreed upon. A local contractor may also negotiate separately with the IBEW although this is not commonly done.

Both NECA and IBEW International reserve the right to approve or veto all collective bargaining agreements entered into by the local organizations.

NECA and IBEW International also enter into national agreements, whose terms are incorporated into local agreements between NECA and IBEW. It is a provision of the 1976 National Agreement between NECA and IBEW [4] that appellees challenged below as being in violation of the Sherman Act. The first five articles of the 1976 agreement provide for the National Electrical Benefit Fund (a pension fund), shift work, management rights, and apprentice ratios. Article 6, the one challenged below, provides for the establishment of an industry fund. Article 6 states:

> The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.
>
> All construction agreements in the electrical industry shall contain the following language:
>
> > "Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do

[4] This agreement was announced in the spring of 1976 and ratified at the October 1976 meeting of the NECA Board of Governors. The agreement went into effect on July 1, 1977.

so will be considered a breach of this agreement on the part of the individual employer." *(an amount not to exceed 1% nor less than 0.2 of 1% as determined by each local chapter and approved by the trustees)

The National Electrical Contractors Association will be responsible to see that the objects of the fund, as outlined in the trust, are adhered to strictly.

No part of the funds collected under this trust shall be used for purely social activities.

No part of the funds collected under this trust shall be used for any purpose which is held to be in conflict with the interests of the International Brotherhood of Electrical Workers and its local unions.

Both parties will be provided with a copy of the Trust and any further amendments.[5]

On December 8, 1976, President Pillard of IBEW and Vice President Higgins of NECA signed the agreement containing the provision for the industry fund. Contemporaneously they signed a paper called "Basic Understandings and Interpretations of the IBEW-NECA Agreement" which provided in part:

Article Six—Industry Fund

(1) It is understood that because of the cost of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry by the National Association and

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[5] The National Agreement provides that less than 1% of the labor payroll may be collected by the local NECA chapter, but the local must collect at least .2 of 1%, the amount which must be remitted to the national organization. Both parties, as well as the district court, have treated the required contribution to be 1%. The record supports a conclusion that 1% is the usual amount collected.

> the NECA chapters that the intent of this Article is to insert the industry fund contribution language in all IBEW construction agreements containing the NEBF language except those covering employees of utility companies and municipalities and employees working under contractor equipment maintenance agreements and employees working for motor shops. In return, NECA will provide basic service to electrical contracting employers employing workmen obtained from the IBEW without regard to the affiliation of the individual employer with NECA.

Appellees challenged the industry fund provision under the Sherman Act, alleging that the fund added a 1% charge to the cost of all their electrical construction contracts with IBEW whether the contractor belonged to NECA or not. Appellees noted that prior to the 1976 agreement members of NECA paid dues and a service charge for their membership in and services received from NECA.[6] The 1976 agreement thus increased their cost of doing business. Thus, non-NECA members, who paid no dues or service charges, had a competitive advantage over NECA members when bidding on contracts. In order to end this situation, argued appellees, appellants initiated the 1% contribution to be applied uniformly to all IBEW construction contracts whether the contractor was a member of NECA or not, thereby stabilizing the price of electrical construction contracts. As a result, non-NECA contractors no longer had a competitive edge over their NECA competitors. Appellees claimed that appellants' actions constituted price fixing, a per se violation of the Sherman Act. The district court agreed and in a thorough and detailed opinion granted summary judgment for the appellees, finding the anticompetitive

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[6] The dues were $50.00 per year with a service charge of .2% of their labor payroll after the first year of membership.

purpose necessary for a finding of price fixing a per se violation of the Sherman Act.[7]

The district court also summarily dismissed as without merit the NECA defendants' counterclaims that appellees were engaged in a boycott, illegal under § 1 of the Sherman Act, by their concerted refusal to pay what they owed into the industry fund. 498 F.Supp. at 551. The NECA defendants appeal this grant of summary judgment for the appellees on the counterclaims.

Before dealing with appellants' substantive arguments, we note that appellants Colgan Electric and Miller Electric argue as a separate issue that the district court erred in not granting their motion to dismiss the complaint because venue was improper as to them since they were not transacting business in Maryland as required by § 12 of the Clayton Act, 15 U.S.C. § 22.[8] The district court found that they were in fact transacting business in Maryland because of their dealings with NECA to which they both belonged and paid substantial amounts in the form of dues and industry fund contributions. We cannot say that such a conclusion is clearly erroneous, and accordingly affirm the district court's denial of the motion to dismiss. *United States v. Scophony Corp.*, 333 U.S. 795, 68 S.Ct. 855, 92 L.Ed. 1091 (1947). See especially *Scophony* at p. 807, 68 S.Ct. at p. 861, and the con-

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[7] The district court discussed at length the evidence before it which had been produced by both sides regarding the agreement. We need not discuss such evidence in any detail except as it applies to the issues to be dealt with later in this opinion.

[8] § 12 of the Clayton Act reads in part:

> Any suit, action, or proceeding under the anti-trust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . .
>
> The parties agree that Miller and Colgan are neither inhabitants of Maryland nor are they found there.

curring opinion of Justice Frankfurter at p. 818, 68 S.Ct. at p. 867.

Appellants' primary contention on appeal is that summary judgment for the appellees in their price fixing case was inappropriate. Preliminarily we note that the Supreme Court has cautioned against the granting of summary judgment in antitrust cases, stating in *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ," and we have had occasion to follow this case in *Morrison v. Nissan Co., Ltd.*, 601 F.2d 139 (4th Cir. 1979). This is not to say that summary judgment is never appropriate in antitrust cases, see *White Motors Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), and in fact grants of summary judgment in such cases have been explicitly affirmed. *Citizens Publishing Co. v. United States*, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969); *First National Bank v. Cities Service*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

With these rules in mind, we analyze appellants' arguments. They initially contend that summary judgment was inappropriate because a genuine issue of fact exists regarding the meaning of Article 6 of the NECA-IBEW National Agreement. First, they argue that the language of Article 6, when considered in connection with the remainder of the National Agreement, is ambiguous on its face. The district court disagreed, holding instead that the language in the agreement clearly required the inclusion of the fund in all IBEW electrical construction contracts at issue here. We agree that there is nothing ambiguous at all about the agreement's language. On its face the agreement requires inclusion of the industry fund clause in all such contracts.

Even if the language itself is clear, argue the appellants, a consideration of the evidence submitted in the

form of documents and pre-trial depositions create an issue of fact as to the meaning of Article 6. To support this argument, appellants principally rely upon several pieces of evidence which we shall consider separately. We find no error in the district court's rejection of the pre-trial depositions submitted by the appellants as sufficient to create an issue of fact. This testimony amounted to no more than a denial of the meaning of the clear words of the contract. In no way does it seek to clarify the terms of the contract, but instead seeks to change the terms of an already clear agreement.[9]

Appellants also contend that other documents submitted to the district court create a question of fact as to the meaning of Article 6. The minutes of the October 1976 Board of Governors meeting of NECA reflect that Robert Higgins, Executive Vice President of NECA, read to the group a letter from its counsel, Henry H. Glassie, with reference to whether or not the NECA bylaws would have to be amended to reflect the industry fund as a change in NECA dues. Concluding that they would not, Glassie in part stated, as transcribed, as follows: "If the industry fund provided for in the Article 6 of the agreement referred to in proposal number 3 applies to the NECA members, as such, a change in the by-laws would be involved. However, we are informed that the contribution to this fund as provided in Article 6 will be required of all union electrical contractors whether they are members of NECA or not. Indeed, would be applicable to a company after resignation from NECA. And moreover that the contribution will not be required of non-NECA members and non-union members of NECA."

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[9] This also applies to IBEW President Pillard's letter to NCA in June 1977 in which Pillard denied the interpretation of the agreement that NCA placed upon it, but immediately followed the denial with the statement that: "It is true that, by July 1, 1977, we expect that all local IBEW-NECA agreements will have been amended to include a number of new provisions, including contributions to the [Industry] Fund."

We first note that the minutes of the meeting are self contradictory. At one place they state that the industry fund contributions are "required of all union electrical contractors whether they are members of NECA or not." In the second sentence following, the minutes then contradict themselves as they state that "the contribution will not be required of non-NECA members and non-union members of NECA." The very best that can be said of the minutes is that they both corroborate and flatly contradict NECA's position in the case. There was a mistake made in reading the letter from Glassie, however, or in the transcription of the minutes of the meeting. The letter itself did not contain the critical words "non-NECA members and," but read (in the form of a clause in the letter) "The contribution will not be required of non-union members of NECA." Even if we accept the minutes of the meeting instead of the content of the letter (and no reason is offered as to why the letter is not the proper document to use), they do not clarify any claimed ambiguity existing in the agreement but amount at the best to no more than an ambiguous interpretation thereof. The letter from Glassie obviously supports the already clear contract terms, and, indeed, its observation that contribution would not be required of non-union members of NECA only states the obvious. In all events, the status of non-union members of NECA is not a matter of dispute in this case and is of no consequence.

Appellants next rely upon a December 1976 letter from Charles Pillard, President of IBEW International, to its locals which notes that local unions are to seek to reopen agreements with non-NECA employers by mutual consent to include the industry fund in "all non-NECA inside and outside construction agreements." We see no way that this letter supports appellants' position, rather, it supports appellees' contention that the provision for the industry fund goes in all applicable contracts. We reject appellants' argument that this evidence shows that they merely intended to request the inclusion of the fund

in labor contracts, for the letter obviously applied to existing contracts which would require agreement to change.

Appellants next rely upon three letters from Pillard to three different local unions, their text being very similar, advising the locals that they must bargain in good faith with contractors who terminated their letters of assent. Again, we do not see how these letters support appellants' contentions. At best they show that the local unions were advised as to their obligations under the National Labor Relations Act to bargain in good faith as to a whole contract and not take a take or leave it stance in negotiations.

Finally, appellants rely upon a June 1978 letter from Pillard to the union locals which stated that local unions should specifically remove from the bargaining table the industry fund if a contractor objected to its inclusion. Not only was this letter sent almost a year after this lawsuit was filed, it only reflects how the union at that later time wished to handle the industry fund. It does not clarify the agreement itself.

All of this evidence taken together shows no more than appellants' attempt to change the meaning of the National Agreement to reflect how they *now* wish the contract to be read. None seeks to clarify any particular language or term in the National Agreement. As such, they have no effect upon an obviously clear agreement.

The National Agreement and the Basic Understanding must be considered together as documents which are a part of the same transaction. *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (5th Cir. 1966); 4 Williston, *Contracts* (3d Ed.) § 628. The agreement states very clearly that the industry fund goes "in all construction agreements in the electrical industry." As such, we need go no further to find appellants' intent. *Locafrance U.S. Corp. v. Intermodal Systems Leasing*, 558 F.2d 1113 (2d Cir. 1977); *E. P. Hinkel Co. v. Manhattan Co.*, 506 F.2d

201 (D.C.Cir.1974). But, even if we go further, the Basic Understanding says the same thing, to wit: "in all IBEW construction agreements containing the NEBF language." The evidence shows, without dispute, in the NECA-IBEW Employees Benefit Agreement, that all contracts with IBEW unions contain NEBF provisions whether the contractor belongs to NECA or not. These two documents, then (the National Agreement and the Basic Understanding), read separately or together leave no doubt as to the applicability of the industry fund to all IBEW construction contracts. Appellants' evidence shows no more than that NECA and the IBEW sought to read the contract differently at a later date.

We also agree with the district court that the evidence presented was so removed in time and self serving as to not create a genuine issue of fact as to the meaning of the contract. The district court did not err in relying upon the clear language of the agreement in deciding the issue in the appellees favor.[10] *Va. Impression Products Co. v. SCM Corp.*, 448 F.2d 262 (4th Cir. 1971).

Appellants next claim that the district court erred in concluding that the agreement in question constituted price fixing illegal per se under the Sherman Act. Instead, they contend that no restraint of trade existed. Alternately, if a restraint of trade is found, appellants contend that it must be judged under the rule of reason.

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[10] Appellants further claim that in actuality IBEW did not insist upon inclusion of the fund in every contract signed, and that some labor contracts entered into during this time did not include the industry fund. The fact that the IBEW was somewhat less diligent than it might have been in enforcing the provisions of the National Agreement is not a defense, especially since the language of the agreement itself leaves no room for debate that the fund was to be included in all construction contracts. An activity does not have to be a complete success to violate the antitrust laws. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402, 47 S.Ct. 377, 381, 71 L.Ed. 700 (1927); *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970); *Plymouth Dealers Assoc. v. United States*, 279 F.2d 128 (9th Cir. 1960).

Although a literal reading of the Sherman Act would make illegal all contracts if they restrain trade in any particular, the Supreme Court has construed the statute to outlaw only unreasonable or undue restraints. *Standard Oil of N.J. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). In *Standard Oil* the Court established the rule of reason as a method of examining the actions of parties to determine if § 1 has been violated by looking at the purpose, character, and effect of the actions in question. Unreasonableness is based upon either the nature of the contract or upon the surrounding circumstances that give rise to an inference that the parties intended to restrain trade or enhance prices. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). By this standard, the courts decide whether conduct is unreasonably anticompetitive in character or in effect.

Certain practices whose nature and effect are so clearly anticompetitive have been held to be illegal per se. Those specifically include price fixing.[11] E.g. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *Pa. W. & P. Co. v. Consolidated G. E. L. & P. Co.*, 184 F.2d 552 (4th Cir. 1950). The critical analysis in determining whether a particular activity constitutes a per se violation is whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

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[11] As the Supreme Court noted in *Northern Pacific RW v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958): "because of their pernicious effect on competition and lack of any redeeming virtue [such activities] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." The Court mentioned price fixing, division of markets, group boycotts, and tying arrangements.

As just noted, price fixing is one of those practices that the Court has held to be illegal per se under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). The Court stated at 223, 60 S.Ct. at 844 "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." To be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing.[12] An activity can violate the per se rule even if its effect upon prices is indirect. *United States v. General Motors*, 384 U.S. 127, 147, 86 S.Ct. 1321, 1331, 16 L.Ed.2d 415 (1966). In essence, an interference with the market forces freely setting the prices of goods is sufficient. *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1137 (5th Cir.) cert. den. 433 U.S. 910, 97 S.Ct. 2976, 53 L.Ed.2d 1094 (1977).

There can be no doubt that the agreement in question here, which adds a 1% charge to all IBEW construction contracts falls within the definition of price fixing. By taking the additional 1% of labor costs from non-NECA contractors it robs them of a competitive advantage beneficial to the public. It clearly interferes with the market forces that set the price of such contracts. The industry fund would tend to stabilize the price of

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[12] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980), elimination of interest free short term credit; *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), exchange of price information as stabilizing although lowering prices; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), setting minimum prices; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), setting maximum prices; *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), buying surplus gasoline to stabilize prices; *Plymouth Dealers Assoc. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960), establishing price list from which negotiations began.

electrical construction contracts, a practice illegal per se under the Sherman Act.

Appellants further contend that even if the per se doctrine is applicable the district court erred because a genuine issue of fact existed as to the purpose of the fund. Additionally, they argue that the district court erred as a matter of law because it concluded that an anticompetitive effect need not be shown in order to prove price fixing. Appellants would argue instead that both anticompetitive purpose and effect must be proven. Such an argument is without merit. We know of no better statement of the rule than that of this court in *United States v. Society of Ind. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1979), cert. den. 101 S.Ct. 859, 449 U.S. 1078, 66 L.Ed.2d 801, where we stated: "Since in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' *United States v. Trenton Potteries*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700 . . . ." See also 2 Areeda & Turner, *Antitrust Law* § 314.[13] As this decision makes clear, a specific finding of anticompetitive purpose and effect is not needed. But, even if it were, there is no doubt, as the district court found,

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[13] In *United States v. McKesson & Robbins*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956), the Court stated: "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act & that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil, whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices."

that, on its face, this agreement has an anticompetitive purpose, which is to add the 1% of labor cost to all IBEW construction contracts which could only stabilize prices of NECA and non-NECA contractors.

This brings us to appellants' objections to the injunctive order entered by the district court which was in two parts.

The first part of the injunction enjoins NECA and IBEW and others named from "seeking to continue, continuing, enforcing, maintaining, or renewing Article 6 of the National Agreement . . . as to any person, corporation, or other entity which is not a member of the National Electrical Contractors Association or from entering into, maintaining or participating in any act, contract, agreement, understanding, plan, program, or other arrangement with any person, corporation, or other entity which is not a member of the National Electrical Contractors Association that includes any provision for implementation of Article 6 of the aforesaid agreement." The second part of the injunction enjoins the same defendants from "demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund, or any alternate or substitute therefor, the effect of which would be to add a surcharge, determined by a uniform formula, to the cost of procuring all contracts with the IBEW in the electrical construction industry."

Appellants object to the first part of the injunction as being overbroad in that a non-NECA employer who voluntarily assents to pay into the industry fund should not have been included. That objection is without merit. In *Perma Mufflers v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), the Court held that the fact the plaintiff may have been *in pari delicto* does not prevent a suit under § 1 of the Sherman

Act. The Court said the courts do not "have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others." p. 139, 88 S.Ct. p. 1984. Thus, under *Perma Mufflers* there is no reason to deny non-NECA employers relief although they may have previously voluntarily assented to a NECA-IBEW agreement.

Appellants next object to the second part of the injunction which they say could be construed to prohibit any demand that an IBEW local might unilaterally make in collective bargaining to be characterized as a uniform surcharge on labor contracts. They say that it prevents the union, even acting unilaterally, from doing the very thing that § 7 of the National Labor Relations Board Act, 29 U.S.C. § 157, permits unions to do, that is, to bargain collectively on any permissive or mandatory subject of bargaining. That objection is well taken only to a very small extent. The question of whether or not the industry fund is either a permissive or mandatory subject of collective bargaining is not before us, but, for present purposes, we will assume that it is a permissive subject of collective bargaining. Merely, however, because establishment and maintenance of the industry fund may be a permissive subject of collective bargaining does not automatically exempt the IBEW from the provisions of the antitrust laws. This was specifically held in *Allen Bradley v. Local Union No. 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). In *Allen Bradley* the Court upheld a finding of the district court which had found Local 3 of IBEW guilty of a violation of the Sherman Act for acting in concert with business organizations and with manufacturers of goods to restrain competition in and monopolize the marketing of such goods in New York City. The Court found that ". . . the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." 325 U.S.

at 810, 65 S.Ct. at 1540. The gist of the Court's reasoning, which is applicable here, is found on the same page of the opinion where it said: "For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." The Supreme Court in *Allen Bradley* did require a modification of the decree "so as to enjoin only those prohibited activities in which the union engaged in combination 'with any person, firm or corporation which is a non labor group' ". p. 812, 65 S.Ct. p. 1541. The second part of the order complained of does no more than this. It enjoins the "above mentioned defendants" (which include NECA and IBEW) from demanding, etc., from non-NECA members contributions to the National Electrical Industry Fund. The order must be read in the context of the case instead of divorced from it. As such, it undoubtedly means the defendants acting together and not the defendants acting severally. It leaves IBEW entirely free to pursue any legitimate object of collective bargaining acting unilaterally, but, this, of course, does not include IBEW acting "with any person, firm or corporation which is a non-labor group," *Allen Bradley*, p. 812, 65 S.Ct. p. 1541, to violate the Sherman Act, and this expressly includes the maintenance of the industry fund as expressed in the contract between NECA and IBEW.

The standard by which we review such injunctive orders is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 698, 98 S.Ct. 1355, 1368, 55 L.Ed.2d 637 (1978). We think the order of the district court meets that standard; it does no more than enjoin the enforcement of, and collection of money under, a contract held to violate the antitrust laws.

Despite what we have just said with respect to the second part of the order complained of, out of perhaps

an over abundance of caution, and in order to prevent any reading out of context of that part of the district court's order, we direct that the district court modify the second part of its order so that it applies to IBEW only when IBEW is engaged in the prohibited activities "in combination with any person, firm or corporation which is a non-labor group." *Allen Bradley* at 812, 65 S.Ct. at 1541.

We have discussed in some detail the principal contentions of appellants and note that we have considered all of their other assignments of error and find them without merit, including those relating to the granting of summary judgment in favor of appellees on the NECA defendants' counterclaims. Except as may be otherwise indicated in this opinion, we rely upon the district court's complete and thorough discussion of the issues in this case, and its judgment is accordingly

AFFIRMED AS MODIFIED.[14]

K. K. HALL, Circuit Judge, dissenting:

Through its blind application of the *per se* rule against price fixing, the majority ignores the realities of this case and, as a consequence, reaches a manifestly inequitable

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[14] We are aware that, on its particular facts, this is a case of first impression and as such we should be careful in applying the per se rule. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9, 99 S.Ct. 1551, 1557, 60 L.Ed.2d 1 (1979). Cases are legion, however, declaring the illegality of price fixing in various forms, and the agreement here, we think, is as clear as the one struck down in *Citizens Publishing Co. v. U.S.*, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969). The conclusion reached by the Court in that case that "[t]he joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field," p. 136, 89 S.Ct. p. 929, is applicable here. The Supreme Court, indeed, in *United States v. Container Corp.*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), a price fixing case "unlike any other" decided by that Court, found a per se antitrust violation in reviewing a dismissed complaint, certainly without the benefit of any more documents than we have available here.

result. As I believe that the facts before us do not justify an extension of the *per se* price fixing rule, I must respectfully dissent.

Under a provision in the collective bargaining agreement between the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW), the IBEW could not sign any employment contract unless the employer agreed to pay one percent of its gross monthly labor payroll into the National Electrical Industry Fund. Finding that this requirement acts to increase the labor costs to non-NECA contractors and "would tend to stabilize the price of electrical construction contracts," the majority concludes that the agreement is *per se* illegal under the Sherman Act, 15 U.S.C. § 1.

This case, however, is inherently different from those relied on by the majority in that all of the parties involved here receive an extremely important benefit from the NECA/IBEW negotiations, that being the establishment of a fixed wage level. "Assenting" non-NECA contractors (i.e., those who agree to follow the terms of the NECA/IBEW agreement through either "A" or "B" Letters of Assent or International Agreements) receive the benefit directly by accepting all of the gains and concessions secured by NECA during the course of the negotiations.

Non-assenting contractors who bargain directly with the Union enjoy the benefit in a similar, albeit indirect, manner. They have the terms of the NECA/IBEW agreement, especially the wage level, on which they can rely during the course of their independent negotiations. The salary level agreed to by NECA may be employed as a ceiling on the Union's demands. Indeed, the Union has an incentive to obtain a high wage rate from NECA which it will then attempt to carry over into its non-NECA contracts. *See generally* P. Samuelson, ECONOMICS 586-87 (10th ed. 1976). Thus, any wage concessions

NECA is able to draw out of IBEW spill over to the benefit of all non-assenting non-NECA contractors.

Since all electrical contractors benefit from NECA's collective bargaining, it is only fair that they share in the costs of such bargaining. In this regard, it is clear that one of the main purposes of the industry fund is to help defray the costs of the negotiation process. Under the majority's ruling, however, although both assenting and non-assenting non-NECA contractors would continue to enjoy the benefits of NECA's bargaining, neither can be required to contribute to the fund. Moreover, they will receive a windfall in the form of treble damages.

In *Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir.), *cert. denied*, 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980), we ruled that a protective wage clause, requiring a union to demand the same wage scale from all employers who were not members of the multi-employer bargaining unit, did not constitute a *per se* violation of the Sherman Act. Rather,

> [t]o amount to an antitrust violation *the agreement must be rooted in an anti-competitive purpose*, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.

Id. at 431-32 (emphasis supplied).

Since the one percent industry fund charge at issue here has no greater effect on electrical contractor prices than would a protective wage clause, I would follow the *Smitty Baker* standard and avoid the majority's untenable extension of the *per se* rule.

As a final matter, I also disagree with the majority's conclusion that the trial judge did not err in finding de-

fendants Colgan Electric Co. (Colgan) and Miller Electric Co. (Miller) within the venue of the court. The record indicates that their most significant contact with the judicial district of Maryland was the payment of dues to NECA which has its national office located in that state. The holding that mere membership and payment of trade association dues is enough to constitute "transact[ing] business" under § 12 of the Clayton Act, 15 U.S.C. § 22, flies in the face of the well established rule that a defendant's contacts with the forum state must be of a "*substantial* character" in order for venue to be proper. *See Bartholomew v. Virginia Chiropractors Association*, 612 F.2d 812, 815 (4th Cir. 1979), *cert. denied*, 446 U.S. 938, 100 S.Ct. 2158, 64 L.E.2d 791 (1980). Consequently, the district court clearly erred in failing to dismiss the complaint against defendants Colgan and Miller.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 80-1808, 80-1809

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,
Appellants,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Appellees.

Submitted June 1, 1982

Decided Sept. 8, 1982

Before WIDENER and HALL, Circuit Judges, and MICHAEL, District Judge.*

ORDER

I

The National Electrical Contractors Association, et al. filed their petition for rehearing with a request for rehearing en banc, 678 F.2d 492 (4th Cir.).

Upon a request for a poll of the court on the petition for rehearing en banc, less than a majority of the judges in regular active service voted in the affirmative.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc of National Electrical Contractors Association, et al. shall be, and the same hereby is, denied.

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* United States District Court for the Western District of Virginia, sitting by designation.

II

Miller Electric Company and Colgan Electric Company filed their petition for rehearing with a request for rehearing en banc. On the petition there was no request for a poll of the court on the petition for rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc of Miller Electric Company and Colgan Electric Company shall be, and it hereby is, denied.

III

The panel has considered both the said petitions for rehearing and is of the opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that both the said petitions shall be, and they hereby are, denied.

MICHAEL, District Judge, concurs in this entire order.

K. K. HALL, Circuit Judge, concurs in part II of this order and in the denial of the petition of Miller Electric Company and Colgan Electric Company.

As to part I of this order, Judge HALL would have granted the petition for rehearing en banc; as a member of the panel, he would have granted the petition for rehearing of National Electrical Contractors Association, et al.; both for the reasons set forth in his dissenting opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. HM77-1302

Sept. 9, 1980

NATIONAL CONSTRUCTORS ASSOCIATION and COMMONWEALTH ELECTRIC COMPANY, by and on behalf of itself and all others similarly situated and the HOWARD P. FOLEY COMPANY, by and on behalf of itself and all others similarly situated and DONOVAN CONSTRUCTION COMPANY OF MINNESOTA, INC., ARTHUR MCKEE & COMPANY, INC., BADGER AMERICA, INC., CATALYTIC, INC., C. F. BRAUN CONSTRUCTORS, INC., DRAVO CORPORATION, GUY F. ATKINSON COMPANY, THE H. K. FERGUSON COMPANY, JACOBS CONSTRUCTORS, INC., PULLMAN KELLOGG, DIVISION OF PULLMAN, INC., STEARNS-ROGER, INC.

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., ROBERT L. HIGGINS, the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CHARLES H. PILLARD, COLGAN ELECTRIC, INC., MILLER ELECTRIC CO., and H. E. AUTREY, ALLEN L. BADER, FRANK H. BERTKE, DONALD C. CATES, ROBERT W. COLGAN, JOE R. DEVISH and CARL T. HINOTE, in their Individual capacities and as Trustees of the National Electrical Industry Fund, and ALLAN H. STROUPE, L. R. MCCORD, ALDO P. LERO and LOWELL C. TIMM, in their official capacities as Trustees of the National Electrical Industry Fund, and JOHN OSTROW, C. W. STROUPE, WARREN LOSH and J. D. HILBURN, SR., in their individual capacities.

Wilbur D. Preston, Jr., Robert M. Wright, Nevett Steele, Jr., Ward B. Coe, III, Gerson B. Mehlman, and

James R. Chason, of Whiteford, Taylor, Preston, Trimble & Johnston, Baltimore, Md.; Anthony J. Obadal, Steven R. Semler, Howard J. Kaufman, Alan D. Cirker, Stephen C. Yohay, of Zimmerman & Obadal, Washington, D.C.; Ira Genberg, Peter R. Spanos, of Stokes & Shapiro, Atlanta, Ga., for plaintiffs.

Guy Farmer, of Farmer, Shibley, McGuinn & Flood, Washington, D.C., Alan I. Baron, Peter H. Gunst, of Frank, Bernstein, Conaway & Goldman, Baltimore, Md., for defendant National Electrical Contractors Ass'n, Inc. and all other defendants Except defendants International Broth. of Electrical Workers, AFL-CIO and Charles H. Pillard.

Thomas X. Dunn, Richard M. Resnick, of Sherman, Dunn, Cohen & Liefer, Washington, D.C., James P. Garland, Anthony W. Kraus, Steven D. Frenkil, Nora Winay, of Semmes, Bowen & Semmes, Baltimore, Md., for defendants International Broth. of Electrical Workers and Charles H. Pillard, International President of IBEW.

MEMORANDUM OPINION

HERBERT F. MURRAY, District Judge:

I. *Factual Background*

This is a private antitrust action for treble damages and declaratory and injunctive relief, brought under § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Currently pending before the court are eight motions, on which the court has heard extensive oral argument. An explanation of the factual background of the dispute is essential to an understanding of the pending motions.

Plaintiff National Constructors Association (NCA) is an unincorporated trade association whose members are "corporations who perform electrical construction work and who otherwise transact business in the electrical construction industry." Amended Complaint at 4. Of the

remaining plaintiffs, Commonwealth, Foley, Donovan, Catalytic, Braun, Atkinson, Ferguson and Pullman-Kellogg are corporations which perform electrical construction work and employ electrical construction workers who are members of the defendant IBEW and its local unions. McKee, Badger, Dravo, Jacobs and Stearns-Roger are also corporations which perform electrical construction work, but rather than employ IBEW workers directly, they hire electrical construction contractors who in turn employ IBEW labor. None of those corporate plaintiffs except Donovan is a member of defendant National Electrical Contractors Association, Inc. (NECA).

Defendant NECA is an incorporated trade association whose members, like those of NCA, perform electrical construction work. Although NECA's principal place of business is in Bethesda, Maryland, the association has approximately 133 [1] local chapters nationwide. NECA and its local chapters provide various services to member companies, including representing members in collective bargaining with the IBEW and its local unions. Amended Complaint ¶ 4(a)(iii).

Defendant IBEW is an unincorporated labor organization whose local unions throughout the United States represent at least some of the electrical workers whom the corporate plaintiffs employ. Defendant Charles H. Pillard is now and at all pertinent times was International President of the IBEW; defendant Robert L. Higgins is and at all pertinent times was Executive Vice President of NECA.

Defendants Colgan Electric Co. and Miller Electric Co. are corporations engaged in the electrical contracting business and are members of defendant NECA. The remaining defendants are the trustees of the National Elec-

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[1] Some of the pleadings set the figure at 330. Suffice it to say that the local chapters are numerous.

trical Industry Fund (NEIF), which is more fully described below.

At the heart of the plaintiffs' suit is the collective bargaining structure in the electrical construction industry. Local chapters of NECA, which is the largest trade association in the industry, are assigned regional territories throughout the country which coincide with the jurisdictions of one or more IBEW local unions. Acting as a multi-employer bargaining unit representing its chapter members, each NECA chapter periodically negotiates a collective bargaining agreement with the IBEW union or unions in its territory. Each "Local Agreement" provides for wages, hours, terms and conditions of employment, and any other subjects of bargaining permitted by the National Labor Relations Act. A Local Agreement is either "inside," covering labor on the interior of buildings, or "outside," covering labor on outdoor power lines. Although the IBEW locals also negotiate with other local contractors' associations, the majority of the Local Agreements are the result of collective bargaining between the unions and NECA chapters.

Individual electrical contractors who are not members of NECA usually enter into a labor agreement with the IBEW in one of three ways. The most prevalent practice is for the contractor to sign a short-form agreement known as a Letter of Assent, which binds the signatory to the terms of the existing NECA-IBEW Local Agreement for the area in which the contractor works. There are two types of Letters of Assent: Type "A" authorizes the local NECA chapter to act as the signatory's collective bargaining agent for all matters contained in the existing NECA-IBEW Local Agreement, and remains in effect until the contractor gives timely notice of termination. Type "B" does not authorize NECA to act as the contractor's collective bargaining agent, but merely binds the signatory for a stated period (usually the life of the current Local Agreement) to all the terms of the exist-

ing Local Agreement and any amendments that might be made to it.

The second method by which an unassociated contractor enters into a labor agreement with the IBEW is by signing an "International Agreement." Large general contractors which perform construction work at several sites across the country usually adopt this second method. The International Agreement is in effect a nationwide Letter of Assent, which binds the signatory to the terms and conditions of the NECA-IBEW Local Agreements for any and all geographic areas in which the general contractor seeks to procure IBEW labor. Made available by the IBEW's international office, an International Agreement is terminable at will upon sixty days' notice.

The third means of negotiating with the IBEW is by signing a "Project Agreement." As the name implies, such an agreement is usually designed to cover a single construction project which the contractor has in the area, and may contain any terms on which the parties agree. Although a Project Agreement is negotiated independently of the NECA agreements, the IBEW usually seeks to procure the terms of the Local Agreements in an unassociated contractor's Project Agreement.

Both NECA and the IBEW International reserve the power to approve all collective bargaining agreements entered into by local chapters or local unions. Either national body may veto an agreement if its terms do not conform to the association's or the union's policies.

As of December 1976, the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of NECA-IBEW Local Agreements, either as members of local NECA chapters, or as signatories to Letters of Assent or International Agreements.

In the summer and fall of 1975, national officials of NECA and the IBEW began negotiation of the agreement

which the plaintiffs contend violates § 1 of the Sherman Act. The parties undertook the negotiations at least in part to provide for increased employer contributions to the National Electrical Benefit Fund (NEBF), which is a pension fund for IBEW workers, jointly administered by NECA and the IBEW and funded by payments provided for in electrical construction industry collective bargaining agreements. At the meetings that began in 1975, International President Charles H. Pillard and his Administrative Assistant Marcus Loftis represented the IBEW; Executive Vice President Robert L. Higgins and Director of Labor Relations Mark Hughes represented NECA.

In the spring of 1976, the parties tentatively agreed to what will hereinafter be referred to as the National Agreement, a copy of which is appended hereto as Exhibit A. The first five articles of the agreement contained provisions for the NEBF, shift work, management rights and apprentice ratios. Article Six, which is the crux of this litigation, provided as follows:

ARTICLE SIX—INDUSTRY FUND

The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do

* (an amount not to exceed 1% nor less than 0.2 of 1%, as determined by each local chapter and approved by the trustees)

> so will be considered a breach of this agreement on the part of the individual employer."
>
> The National Electrical Contractors Association will be responsible to see that the objects of the fund, as outlined in the trust, are adhered to strictly.
>
> No part of the funds collected under this trust shall be used for purely social activities. No part of the funds collected under this trust shall be used for any purpose which is held to be in conflict with the interests of the International Brotherhood of Electrical Workers and its local unions.
>
> Both parties will be provided with a copy of the Trust and any future amendments.

The industry fund thus created was to be used primarily to cover NECA's "costs of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry." *See* Exhibit 10 to plaintiffs' motion for summary judgment.

As required by the association's bylaws, the NECA Board of Governors ratified the National Agreement at a meeting in Dallas in October 1976. The IBEW rules did not require a similar ratification vote. On December 8, 1976, both Charles Pillard and Robert Higgins signed the agreement, which was to become effective on July 1, 1977.

Between December 1976 and July 1977, NECA and the IBEW took steps to implement the National Agreement, including the new NEIF. Local IBEW unions and NECA chapters were instructed to insert the industry fund provision in existing NECA-IBEW Local Agreements. Although the defendants contend that the language of Article 6 was to be inserted only in contracts between the IBEW and NECA members, the plaintiffs argue that the defendants sought to have the language included in all construction agreements in the electrical industry.

The plaintiffs allege that prior to July 1, 1977, NECA members paid dues to their association in order to pay for the services NECA offered such as advertising, negotiating, training employees and disseminating information. Because those dues added to NECA members' cost of doing business, non-NECA members allegedly had a competitive edge in bidding on electrical construction projects. The plaintiffs claim that by providing for a uniform 1% contribution to a fund that would support NECA services, and by ensuring that the 1% requirement was in *all* construction contracts in the industry, regardless of a contractor's affiliation with NECA, the defendants agreed to fix, maintain and stabilize the price of contracts with the IBEW—and consequently all prices in the electrical construction industry—for the purpose of eliminating non-NECA members' competitive advantage. The plaintiffs contend that under the line of cases beginning with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), the National Agreement constitutes a price-fixing agreement which is on its face a *per se* violation of § 1 of the Sherman Act. They seek a declaratory judgment that the NEIF is illegal, an injunction preventing the defendants from enforcing the NEIF provisions, and monetary relief of three times the amount each plaintiff has already paid into the fund.

NECA and the trustees of the NEIF have filed counterclaims alleging that the plaintiffs have engaged and are engaging in an illegal conspiracy and boycott in violation of § 1 of the Sherman Act. The activity alleged to be illegal is the plaintiffs' concerted undertaking to refuse to pay into the NEIF, with the alleged purpose of injuring NECA and compelling it to acquiesce in the plaintiffs' plans for "a single multitrade bargaining agreement [in] all unionized sectors of the industrial construction industry." Memorandum in Support of Motion of NECA and the Trustees of the NEIF for Summary Judgment, at 1.[2]

[2] The NEIF trustees have filed a number of related actions throughout the country, seeking to recover on a breach of contract

Of the eight motions now before the court, three are motions to dismiss. The first is the defendants' motion to dismiss NCA as a plaintiff on the grounds it lacks standing. The second is the defendants' motion to dismiss those plaintiffs who do not hire IBEW labor directly, but instead employ electrical contractors who in turn hire IBEW workers. Those parties will be referred to hereinafter as the "indirect-hire plaintiffs." The third motion is that of defendants Miller and Colgan to dismiss the complaint as to them, on the grounds that they as corporations were not involved in any alleged conspiracy.

The fourth and fifth motions to be decided are cross-motions for summary judgment on the plaintiffs' claim that the National Agreement is on its face a price-fixing agreement illegal *per se*. The sixth motion is the plaintiffs' motion for class certification, and the remaining two are cross-motions for summary judgment on the boycott counterclaims. The court will discuss the motions in the order in which they have been described.

II. *The Motion to Dismiss Plaintiff NCA*

The primary issue is whether NCA has standing to sue for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26. The defendants argue that a private plaintiff does not have standing at all under the antitrust laws, unless it can show some injury or threatened injury *personal to itself*; and that NCA has made no such showing. NCA claims that strict standard applies only under § 4 of the Clayton Act (15 U.S.C. § 15), where a plaintiff seeks monetary damages; and that § 16 embodies more flexible general rules of standing, including the tests set out in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333,

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theory the amounts which several electrical contractors have refused to pay into the NEIF. For purposes of this opinion, the related actions will be referred to as the "collection cases."

97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), for determining when an association may sue in a purely representational capacity on behalf of its members.

If NCA could meet the stricter standard of showing direct injury to itself, there would be no need to explore the relative leniency of § 16 requirements. However, the court is not persuaded that the association is threatened with any personal harm. NCA alleges that the NEIF scheme compels NCA members to support a rival trade association, NECA, and "necessarily places a financial stricture on the operation of their own association, therefore tending to have a stifling effect upon the achieving of their association's purposes either now or in the future." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss NCA, at 2. NCA further contends that the NEIF scheme frustrates NCA's associational goal of reducing operating costs. In the court's view, the awkwardness and abstractness of the plaintiffs' description of the supposed injury reveals that NCA's contentions are without merit. Consequently, the court must determine whether the standing requirements of § 16 are nonetheless broad enough to encompass NCA.

There is long-standing authority in support of the defendants' proposition that *personal* injury is a prerequisite to instituting any private antitrust action. In *United States v. Borden*, 347 U.S. 514, 518, 74 S.Ct. 703, 706, 98 L.Ed. 903 (1954), the Supreme Court said,

> Under § 16 of the Act, . . . a private plaintiff may obtain injunctive relief against [antitrust] violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff. . . . [T]he private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served.

However, since *Borden* was decided, two important trends have developed: first, the courts have increasingly ac-

knowledged that standing requirements under § 16 are broader and more flexible than those under § 4; and second, the courts have recognized that under certain circumstances, an association may have standing solely as the representative of its members.

Section 4 of the Clayton Act provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16, however, states in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

In *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the Supreme Court analyzed the "business or property" requirement in § 16. The Court speculated that the language difference was probably attributable to the different impacts of the remedies offered by the two sections: while 100 simul-

taneous injunctions could be no more effective than one, 100 treble-damage awards could be far more devastating to a defendant than a single monetary judgment. 405 U.S. at 261-62, 92 S.Ct. at 890-891. Without commenting further on the § 16 standards, the Court concluded that a party could not sue *under* § 4 without showing injury to its commercial interests. *Id.* at 264, 92 S.Ct. at 892.

Most lower federal court cases interpreting *Hawaii v. Standard Oil* have concluded that the standing requirements under § 16 are more lenient and more flexible than those under § 4. *In Re Multidistrict Vehicle Air Pollution MDL #31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045, 94 S.Ct. 551, 38 L.Ed.2d 336 (1973); *Tugboat, Inc. v. Mobil Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Contra, NAACP v. New York Clearing House Ass'n*, 431 F.Supp. 405 (S.D. N.Y.1977), *relying on Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968, 95 S.Ct. 232, 49 L.Ed.2d 184 (1974). The cases recognizing a distinction between § 4 and § 16 requirements imply that a party may sue for injunctive relief under the antitrust laws whenever the party can show the threat of an injury cognizable in equity and proximately caused by the defendant's antitrust violation. *Mid-West v. Continental, supra; Tugboat v. Mobil Towing, supra. See also Buckley Towers Condominium, Inc. v. Buchwald*, 595 F.2d 253 (5th Cir. 1979).

At about the same time that the courts began to hold the requirements of § 16 were more lenient, the Supreme Court was developing the doctrine that in certain well-defined circumstances, an association may have standing to represent its members even when the association as such had suffered no injury. In *Warth v. Seldin, supra*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the court considered whether various individuals and asso-

ciations had standing to challenge an allegedly exclusionary zoning ordinance. Writing for the Court, Justice Powell first set out the general standing requirements in any litigation: each plaintiff must show first that there is a justiciable case or controversy, and second that the plaintiff has "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." 422 U.S. at 498-99, 95 S.Ct. at 2205, *citing Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In elaborating on those prerequisites with respect to associations, the Court said,

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction [citations omitted]. 422 U.S. at 511, 95 S.Ct. at 2211.

In *Hunt v. Washington Apple Advertising Commission*, *supra*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Court reiterated the language just quoted from *Warth*, and rephrased it into a three-part test:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the

> relief requested requires the participation of individual members in the lawsuit. 432 U.S. at 343, 97 S.Ct. at 2441.

In establishing that test, the Court expressly rejected the defendant's claim that the Advertising Commission could not sue because it had no "personal stake" in the outcome of the case, and had alleged no "distinct and palpable injury" to itself. At 341-42, 97 S.Ct. at 2440-2441.

In light of the developments in *Warth*, *Hunt* and the *Hawaii v. Standard Oil* line of cases, this court is persuaded that a plaintiff need not meet the strict personal injury standards of § 4 in order to sue for injunctive relief under § 16, and that an association may have standing under § 16 if it meets the three-part test of *Hunt*. *Associated General Contractors v. Otter Tail Power Co.*, 611 F.2d 684 (8th Cir. 1979); *National Office Machine Dealers Ass'n v. Monroe*, 484 F.Supp. 1306 (N.D.Ill.1980). The court has discovered no persuasive authority that would indicate associational standing is precluded in the antitrust context, and can think of no compelling reason why that should be the rule. The question remains whether NCA has satisfied all three prerequisites under *Hunt*; the court finds that it has.

The first requirement, that NCA's members or any one of them would have standing to sue in their own right, is clearly met. As corporations doing business in the electrical construction industry, and as signatories to labor agreements with the IBEW, at least some of NCA's members undoubtedly have standing to allege that the NEIF provision was to be inserted into *all* construction contracts in the electrical contracting industry, that the scheme as so defined violated the antitrust laws, and that the violation either caused or threatened to cause them direct, personal damage in the amount of the NEIF assessments. The court does not read *Hunt* to require that *each* of an association's members have in-

dependent standing. In this case, it is sufficient that a significant proportion of the association's members are obligated to contribute to the allegedly-illegal NEIF.

NCA has also satisfactorily shown that the interests it seeks to protect are germane to the organization's purpose. Among the association's objectives are "[t]o unite members of the Association in a concerted effort to influence and improve craftsmen efficiency and job performance as well as all other activities affecting operating costs and client relationships" and "[t]o inspire in labor and management a constant adherence to the highest ethical concept of individual and collective social responsibility." NCA Constitution Article II a. and e. Challenging an industry fund which allegedly raises operating costs and allegedly results from an illegal conspiracy between labor and management is certainly pertinent or relevant to NCA's stated purposes. The court does not believe the second prong of the *Hunt* test imposes a stricter standard than that. The defendants argue that NCA cannot prove germaneness because it cannot show that the NEIF has any direct adverse impact on the association's professed goals. However, if that were the test under *Hunt*, the requirement of a showing of direct, personal injury to the association would in effect be reinstated.

In *Hunt* itself, the association whose standing was in dispute was the Washington Apple Advertising Commission, a state agency whose purpose was "protecting and enhancing the market for Washington apples." The Commission had no members in the traditional sense. The Supreme Court first noted that "[i]f the Commission were a voluntary membership organization—a typical trade association—its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court [citing *Warth v. Seldin, supra*]." 432 U.S. at 343, 97 S.Ct. at 2441. In a single sentence, the Court concluded that the Commission's

efforts to remedy the injuries allegedly suffered by Washington apple growers was "central" to the Commission's stated purpose. *Id.* at 344, 97 S.Ct. at 2441. As far as establishing germaneness is concerned, NCA's objections are no more abstract and amorphous than those the Court so readily accepted in *Hunt*, especially in light of the fact that NCA *is* a "typical trade association" in the very industry affected by the NEIF.

Although the question is a much closer one, the court is also persuaded that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The third prong of the *Hunt* test involves two considerations: (1) whether the nature of the claims involves individualized proof, *Hunt, supra*, 432 U.S. at 344, 97 S.Ct. at 2441; and (2) whether the association is competent to speak for its members, *Associated General Contractors v. Otter Tail, supra*, 611 F.2d at 691. For the reasons set forth *infra* in connection with the motion for class certification, the court does not believe the primary issues in the case require individualized proof. The defendants' contention that NCA's members' interests are too diverse to be represented by the association deserves closer analysis.

In *Associated General Contractors v. Otter Tail, supra*, the Eighth Circuit found too many actual and potential conflicts among the members of a trade association to permit the association to speak for all of them. The association sought to enjoin the enforcement of an agreement that the court felt could benefit some members, hurt others, and affect still others not at all. 611 F.2d at 691. The defendants in the case at bar argue that NCA's members have similarly conflicting interests, and point to the fact that many member corporations have not joined in the suit or have voiced their opinion that the NEIF provisions do not injure them. In the court's view, such a "division within NCA" (see Exhibit E to the Reply Memorandum in Support of Defendants' Motion to

Dismiss NCA) is not the kind of conflict that requires individual participation in the lawsuit. There is no evidence that any NCA member feels it stands to *benefit* from the NEIF, and that NCA's presence in the litigation therefore works against that member's interest.

The defendants have argued that some NCA members may oppose the suit to the extent it jeopardizes their delicate negotiating relationships with the IBEW. However, the court does not find that argument sufficient to establish the necessity of the allegedly dissenting members' individual participation. To hold otherwise would be to incorporate into the *Hunt* test a sort of adequacy-of-representation standard even more stringent than the one applied under Rule 23(a)(4) on a motion for class certification. *See* Part VI, *infra* at pp. 545-543. The plain language of *Hunt*'s third prong does not warrant such a holding. To the extent *Associated General Contractors* implies a different result, this court is not inclined to follow the Eighth Circuit's lead, at least under the circumstances presented by this case.

Because NCA meets all the prerequisites for an association bringing suit on behalf of its members, and because the court knows of no reason why those prerequisites should not apply in an antitrust case, the defendants' motion to dismiss NCA must be denied.

III. *The Defendants' Motion for Dismissal on the Pleadings*

The defendants have moved to dismiss the claims for damages and injunctive relief brought by those plaintiffs who do not hire IBEW labor directly, but instead employ electrical construction contractors who in turn employ IBEW workers. These "indirect-hire" plaintiffs are McKee, Badger, Dravo, Jacobs and Stearns-Roger. The defendants contend that those plaintiffs lack standing under §§ 4 and 16 of the Clayton Act because they cannot show any *direct* injury to themselves proximately caused

by the allegedly-illegal NEIF. Although the court agrees that the indirect-hire plaintiffs have no standing to sue for treble damages, the court finds that those plaintiffs are not precluded from seeking injunctive relief. Accordingly, the defendants' motion must be granted in part and denied in part.

The indirect-hire plaintiffs have conceded that their claim for treble damages under § 4 of the Clayton Act is barred by the holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 54 L.Ed.2d 164 (1977). That case established that a plaintiff has no standing to recover monetary damages if he alleges only that the "over-charge" resulting from an illegal price-fixing scheme was passed on to him as an indirect purchaser, through the chain of distribution, in the form of higher costs. The Court reasoned first that such "offensive" use of the passing-on theory should not be permitted when "defensive" use of the same theory had been prohibited in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); and second that the overcharged direct purchaser in a price-fixing scheme was the only party "injured in his business or property" within the meaning of § 4 of the Clayton Act. *Illinois Brick v. Illinois*, 431 U.S. at 728-29, 97 S.Ct. at 2065-2066. The Court also noted its concern with preventing multiple, overlapping recoveries and with ensuring that damage recoveries would not be so divided as to discourage private enforcement of the antitrust laws. *Id.* at 738, 746-47, 97 S.Ct. at 2070, 2074-2075.

The defendants in the instant case argue that *Illinois Brick* did not consider the implications of the passing-on theory in a suit for injunctive relief under § 16, and that the standing requirements under that section were therefore unaffected by the Supreme Court decision. The defendants contend further that the test under § 16 both before and since *Illinois Brick* has been the "target area" test, which is defined as follows in *NAACP v. New York*

Clearing House Ass'n, 431 F.Supp. 405, 409-10 (S.D.N.Y. 1977):

> In order to have standing to sue under the Clayton Act a plaintiff must show more than that he was injured as a result of an alleged antitrust violation, or even that his injury was foreseeable or intended. He must show that he is "within that area of the economy which is endangered by a breakdown in competitive conditions in a particular industry." In other words, the plaintiff must suffer direct injury as a result of the anti-competitive consequences of the defendants' acts. If not, then he cannot sue even if he has suffered injury as a result of his economic relationship to a target of the conspiracy or to one of the conspirators. [Footnotes omitted.]

According to the defendants, the indirect-hire plaintiffs do not pass that test.

The court does not agree that the "target area" test is the correct one to apply when an indirect purchaser seeks only injunctive relief. Even before *Illinois Brick* was decided, the courts were beginning to recognize a distinction between §§ 4 and 16 of the Clayton Act. *Hawaii v. Standard Oil*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *In re Multidistrict Vehicle Air Pollution MDL #31*, 481 F.2d 122 (9th Cir. 1973). *See* the discussion *supra* in connection with the motion to dismiss NCA. Since 1977, that distinction has been held to permit an indirect purchaser to obtain an injunction as long as he can show the traditional "equitable entitlement" to such relief.

One of the leading cases on point is *Mid-West Paper Products Co. v. Continental Group*, *supra*, 596 F.2d 573 (3d Cir. 1979). At issue was an alleged conspiracy among manufacturers to fix the price of paper bags used in packaging cookies, coffee, pet foods and the like. The indirect purchasers were supermarkets who bought the

pre-packaged groceries for resale to their customers. After dismissing the supermarkets' § 4 claims on the authority of *Illinois Brick*, the Third Circuit considered the supermarket plaintiffs' standing under § 16, noting first that the rationales of *Illinois Brick* had no application outside § 4 claims. The court then described the special position of the indirect purchaser:

> For unlike other potential plaintiffs, who may be only remotely affected by the ripples caused by the conspirators' tampering with the supply and demand curve, indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world, money is passing from their hands into the pockets of the price fixers as a result of the conspiracy, and that no rational pricing decisions by any intermediary will erase this fact. [Footnotes omitted.] 596 F.2d at 593.

The court concluded that indirect purchasers were not precluded from obtaining injunctive relief as long as they could establish that "equity principles" entitled them to it. *Id.* at 594.

The Fifth Circuit reached a similar conclusion in *In re Beef Industry Antitrust Litigation, MDL #248*, 600 F.2d 1148 (5th Cir. 1979). The plaintiff cattlemen, ranchers and feeders alleged that the defendant supermarkets fixed the price at which beef was purchased from slaughterhouses and packers, and ultimately from the producers. The Fifth Circuit held that the district court had erroneously dismissed the plaintiff's claims for an injunction. Finding that "the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief," Judge Wisdom then wrote:

> To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. To show a threat of such

> injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspiracy reduced the packers' demand for fat cattle. 600 F.2d at 1167.

The Eighth Circuit adopted a similar rule in *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 408 (8th Cir. 1979):

> To proceed under section 26, the injunctive relief provision, the plaintiff need only show that there is a threat that he will suffer fact of injury and that such threatened fact of injury is causally related to the defendant's pending antitrust violation. [Footnotes omitted.][8]

Judge Watkins of this court, in *Dart Drug Corp. v. Corning Glass Works*, 480 F.Supp. 1091 (D.Md., 1979), relied on the Third and Fifth Circuit decisions to hold that *Illinois Brick* did not preclude injunctive relief for indirect purchasers, but that the plaintiff "must still establish, as § 16 requires, that principles of equity entitle it to such injunctive relief." *Id.*, 1105.

The defendants in the present action cite several cases for the proposition that an antitrust plaintiff may never have standing, under § 4 or § 16, unless the plaintiff can show *direct* injury. In *NAACP v. New York Clearing House, supra*, 431 F.Supp. 405 (S.D.N.Y.1977), the court held that the standing requirements developed in treble damage suits applied to actions for injunctions as well. Although Judge Weinfeld acknowledged that the Supreme Court had recognized a distinction between the requirements of §§ 4 and 16, he was bound by the Second

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[8] *Paschall* involved alleged violations of § 2 of the Sherman Act rather than price-fixing, and did not discuss purchasers. However, nothing in the court's interpretation of § 16 tended to limit that interpretation to the given facts.

Circuit's consistent application of the "target area" test to claims for injunctive as well as monetary relief. *See, e.g., Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968, 95 S.Ct. 232, 42 L.Ed.2d 184 (1974); *Long Island Lighting Co. v. Standard Oil Co. of Cal.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 855, 47 L.Ed.2d 83 (1976). The defendants also cite *Parkview Markets, Inc. v. Kroger Co.*, 1978-2 Trade Cases ¶ 62,373 (S.D.Ohio 1978), in which the court found that the reasoning of *Illinois Brick* did preclude the plaintiffs' requested injunction.

This court is not persuaded that the cases the defendants have cited state the controlling rule of law. To begin with, the majority of those cases are from the Second Circuit, whose acknowledged rule rejecting the distinction between §§ 4 and 16 has not been adopted in the Fourth Circuit. Moreover, because *Parkview Markets* does not focus on an indirect purchaser claiming threatened injury from a price-fixing scheme, the case sheds little light on the question of when such a plaintiff's alleged injury should be considered too remote. Many of the other cases the defendants cite were decided prior to cases such as *Mid-West Paper* and *Paschall, supra*, and in the court's view do not reflect the most recent developments in this area of the law.

In sum, the weight of authority compels the conclusion that in order to have standing to sue for injunctive relief under § 16, an indirect purchaser must show only an "equitable entitlement" to such relief. The court interprets that requirement to mean that the plaintiffs must (1) "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contempora[neous] violation likely to continue or recur," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969), and (2) show that the threatened injury is

proximately caused by the antitrust violation. *Mid-West Paper v. Continental, supra*, 596 F.2d at 594; *In Re Beef Industry Antitrust Litigation, supra*, 600 F.2d at 1167; *Paschall v. Kansas City Star, supra*, 605 F.2d at 409.

The violation which the indirect-hire plaintiffs here allege is the defendants' continuing conspiracy to fix, maintain and stabilize the price of contracts with the IBEW. A scheme which raises a *direct*-hire contractor's cost of procuring IBEW labor very plainly threatens to raise the indirect-hire company's cost of employing that contractor. There is also a definite causal link between any overcharge illegally exacted from those who contract directly for IBEW labor and the threat that the overcharge will be passed on and therefore affect the indirect-hires' own cost of doing business. *Cf. Mid-West v. Continental, supra*, 596 F.2d at 593. Even if the effect on them is secondary and indirect, the plaintiffs in question are close enough to the "ripples" of the conspiracy to be entitled, under general principles of equity, to seek to enjoin the activity which threatens them. The harm they anticipate is clearly definable, and they are only one step removed from the employers who are directly affected by the alleged antitrust violation. The indirect-hire plaintiffs therefore have standing to seek injunctive relief under § 16, and the defendants' motion to dismiss the plaintiffs' claims under that section must be denied. However the motion must be granted with respect to the indirect-hires' claims for damages under § 4.

IV. *Motion of Defendants Colgan and Miller to Dismiss Complaint*

Defendants Colgan Electric Co. and Miller Electric Co. have moved to dismiss the complaint as to each of them, on two grounds: first, that venue does not lie in this district as to either of them, and second, that the complaint fails to state a claim against either Colgan or Miller on which relief can be granted. Although the

question is a close one, the court is of the view that venue *is* proper in this district. And under the liberal rules of pleading, the allegations of the amended complaint are sufficient to withstand the defendants' motion to dismiss for failure to state a claim.

The starting point for an analysis of venue in connection with a corporate defendant in an antitrust case is the special venue provisions of § 12 of the Clayton Act, 15 U.S.C. § 22:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The parties do not dispute that Colgan and Miller are neither inhabitants of nor found in the District of Maryland. The only issue at this stage of the analysis is therefore whether one or more of the defendant corporaitons "transacts business" in this district.

In general, the concept of "transacting business" is to be broadly defined, in order to facilitate actions against antitrust violators in the district where the injuries occurred and where the injured plaintiffs are at home. *Learning Systems, Inc. v. Levin*, 351 F.Supp. 532 (E.D. Mo. 1972); *National Auto Brokers Corp. v. General Motors Corp.*, 332 F.Supp. 280 (S.D.N.Y.1971); *L. S. Good & Co. v. H. Daroff & Sons*, 263 F. Supp. 635 (N.D. W.Va.1967). To that end, the test of venue is "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.'" *United States v. Scophony Corp.*, 333 U.S. 795, 807, 68 S.Ct. 855, 862, 92 L.Ed. 1091 (1948); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F.Supp. 123, 128 (D.N.H.1975); *Donlan v. Carvel*, 193 F.Supp. 246, 248 (D.Md.1961). Beyond those general guidelines, the de-

termination whether a corporation is transacting business within a particular district must ultimately be made on a case-by-case basis, according to the particular facts presented. *Grappone v. Subaru, supra*, 403 F.Supp. at 128; *United States v. Scophony, supra*, 333 U.S. at 819, 68 S.Ct. at 867 (Frankfurter, J., concurring).

The facts concerning Colgan's and Miller's business transactions in Maryland do not make it readily apparent whether the corporations' commercial contacts with the district have been "substantial" or not.[4] Affidavits submitted by the president of each corporation attest that neither defendant has made or solicited sales, performed services or advertised its business in Maryland. Neither corporation has been qualified to do business here, has had a resident agent, place of business, address, telephone or bank account here, or has owned property here. However, the plaintiffs contend that both corporations have engaged in certain transactions in Maryland which make venue in this district appropriate under 15 U.S.C. § 22.

The most important of the transactions the plaintiffs cite are Colgan's and Miller's purchases of services from the National Electrical Contractors Association through the association's headquarters in Bethesda, Maryland. Colgan has been an active member of NECA since 1949; Miller since 1932. Both corporations have paid NECA dues and additional service charges in exchange for such benefits as "labor relations services, marketing services, public relations services, representation with congressional bodies . . . [and] electrical code making services," Colgan deposition of March 17, 1978, at 71, and various NECA publications, Autrey deposition of March 23, 1978

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[4] For venue purposes, a defendant's contacts with a district are scrutinized as of the time of the alleged antitrust violations; that is, when the cause of action accrued. *Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975); *Eastland Construction Co. v. Keasbey and Mattison Co.*, 358 F.2d 777 (9th Cir. 1966).

at 53-60. Representatives of both companies testified at their depositions that their companies' memberships in NECA were highly beneficial and valuable. Colgan deposition at 71, 72 and 77; Autrey deposition at 55-56. Between 1970 and 1977, before the NEIF went into effect, Colgan and Miller paid NECA[5] the following amounts annually:

	Colgan	Miller
1970	$ 2,824.55	$3,025.11
1971	3,354.09	3,113.03
1972	3,621.61	3,733.65
1973	3,708.60	3,934.55
1974	5,060.00	5,310.00
1975	6,340.00	8,256.58
1976	7,129.00	9,925.00
1977	11,542.00	7,117.00

Answers of Colgan and Miller to plaintiffs' interrogatory no. 23, first set. Beginning in July 1977, each corporation made payments into the NEIF to support NECA services; 20% of those payments went directly to the association's national office in Bethesda. In the last six months of 1977, Colgan's NEIF payments totalled approximately $19,000, and Miller's approximately $41,000. Although the plaintiffs assert that they have been unable to obtain comparable information for the years 1978 and 1979, they contend that the corporations' total payments for NECA services has undoubtedly increased since 1977. Motions Hearing Transcript, December 21, 1979, at 1053.

The corporations' transactions with NECA are the primary foundation for the plaintiffs' argument that venue is appropriate in this district. However, the plaintiffs cite some additional transactions between the defendants and Maryland companies. Between 1971 and 1979, Colgan repeatedly and continuously purchased tool parts and

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[5] The amounts represent the percentage of payments made to the local chapters which ultimately went to National NECA in Bethesda. Colgan deposition at 85-86.

repair services from the Black & Decker Company, which handled the billing and invoicing through its office in Towson, Maryland. The annual expenditure was anywhere from approximately $2,300 in 1972 to approximately $180 in 1977. Plaintiffs' Opposition to Motion to Dismiss of Colgan and Miller (hereinafter "Plaintiffs' Opposition") at 7. Miller conducted similar transactions with Black & Decker, but only in the amount of $400-$500 a year. In 1974, Colgan sold $471.63 worth of "computer forms" to the Arundel Asphalt Company in District Heights, Maryland. The plaintiffs also contend that Colgan was "transacting business" with the Rouse Company of Columbia, Maryland. Rouse had two construction projects in Florida and Ohio, on which Colgan worked as a subcontractor for the Lathrop Company. Although Colgan had no contractual relationship with Rouse, the plaintiffs argue that "Colgan was intimately involved with Rouse in performing these projects." Plaintiffs' Opposition at 8.

The court finds that none of the two defendants' dealings with Black & Decker, Arundel Asphalt or Rouse was substantial enough to qualify as "transacting business." Colgan's link with Rouse is too indirect. A single sale of computer forms for just over $400 is hardly continuous or substantial enough to justify subjecting Colgan to venue here. Although the Black & Decker purchases were more regular and longer-lived, their total value over a seven-year period was only about $6,700 for Colgan and $2,800-$3,500 for Miller. The total for the four years prior to the end of 1976, when the National Agreement was signed, was only about $2,541. In short, the question whether venue is appropriate in Maryland as to defendants Colgan and Miller under § 12 of the Clayton Act depends on whether the corporations' purchases of services from NECA in Bethesda constitutes "transacting business" within the meaning of the statute.

The defendants cite *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F.

Supp. 1053 (E.D.Pa.1969), for the proposition that active membership in a trade association whose head office is in a particular district is alone insufficient to establish venue in that district. *Id.* at 1055. In *Philadelphia Housing*, two corporate defendants moved to dismiss the antitrust actions against them on the grounds that venue was improper in the District of Columbia. The plaintiffs maintained that both defendants were active members of a trade association whose meetings they regularly attended in the District; that both had employed the association to perform services on the corporations' behalf; and that the president of one of the corporations had at one time served as an officer of the association. Judge Lord of the Eastern District of Pennsylvania found nothing in the corporations' relationship to the association that would constitute "transacting business" for venue purposes. *Id.* at 1055. Colgan and Miller argue by analogy that because their purchases of services from NECA are part of their active membership in the association, those dealings cannot be characterized as business transactions.

The court agrees that it would be anomalous to confer venue as to a corporation merely because the corporation has joined a trade association headquartered in a given district. The court also agrees with Judge Lord's conclusion that mere attendance at a trade association meeting, or the fact that a corporation's president is an officer of the association, does not mean that the corporation "transacts business" in the association's home district. However, the facts of the present case are distinguishable from and more complex than those Judge Lord considered. Both Colgan and Miller expended somewhere in the neighborhood of $44,000 between 1970 and mid-1977 for the services NECA provided. Each corporation considered its membership in the association to be a highly important aspect of its business activities, and took every opportunity to make that membership known to others. Robert Colgan, president of Colgan Electric, wrote an

article in the Electrical Contractor Magazine (a NECA publication) in September, 1976, in which he averred that his company's investment in NECA was an investment in his business, the entire industry, and even in the country. Exhibit B to Plaintiffs' Opposition. In the same vein, H. E. Autrey, president of Miller, testified at his deposition that membership in NECA was the corporation's "total way of life in the construction industry." Autrey deposition at 55-56. The nature of the NECA services themselves indicates how intimately related they were to the conduct of the two corporations' business: NECA assisted in collective bargaining, marketing, public relations and political lobbying, among other services.

When a corporation regularly and continuously expends several thousand dollars a year to procure a wide variety of services which it deems integral to the conduct of its business, the corporation's affiliation with the association goes beyond the kind of membership discussed in *Philadelphia Housing*, characterized only by attendance at meetings and service as an officer of the association.[6] When the expenditures total at least $44,000 for the seven years immediately preceding and during the formation of the supposedly illegal conspiracy, the transactions involved are "substantial" within the meaning of *United States v. Scophony*, *supra*, 333 U.S. at 807, 68 S.Ct. at 861. It is the continuity of the transactions and their importance to the companies, as well as the dollar amounts, which lead the court to conclude that both Colgan and Miller were and are "transacting business" with NECA within the meaning of 15 U.S.C. § 22. Furthermore, although many of the companies' dealings with NECA were through the local chapters, the court finds

[6] Although the corporations in *Philadelphia Housing* were alleged to have employed the trade association there "to perform services on their behalf," 309 F.Supp. at 1055, there is no indication that the services were as extensive and/or considered as valuable as those offered by NECA. Furthermore, Judge Lord did not even address the allegation.

that both Miller and Colgan were in effect "transacting business" with national NECA in Bethesda, Maryland, as well as with the local chapters. The payments listed above went to the national headquarters in Maryland, in return for the services both companies prized very highly. Publications and other materials distributed through the local chapters were developed and produced at the association's national headquarters. Autrey deposition at 54-55; Colgan deposition at 72. It would be not only unrealistic, but also contrary to the liberal interpretation afforded § 22, to deny that the two companies' transactions with NECA were transactions with an association in the state of Maryland.

For all of the foregoing reasons, the court has concluded that venue will lie in this district as to both Colgan and Miller. The complaint therefore cannot be dismissed for lack of venue. The defendants' second ground for their motion to dismiss—that the complaint fails to state a claim on which relief can be granted—is similarly without merit.

A complaint will survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A *Moore's Federal Practice* ¶ 12.08 at 2274 (2d ed. 1970); *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *George C. Frey v. Pine Hill Concrete*, 554 F.2d 551 (2d Cir. 1977). The general test for adequacy of the pleadings under Rule 8 of the Federal Rules is whether the statement of the claim contains the required elements, stated plainly and succinctly, and whether it gives the opposing party fair notice of the nature and basis of the claim. 2A *Moore's Federal Practice* ¶ 8.17[1] (2d ed. 1979); *Conley v. Gibson, supra; Local 1852 v. Amstar Corp.*, 363 F.Supp. 1026 (D.Md.1973); *aff'd*, 508 F.2d 839 (4th Cir. 1974), *cert. denied*, 421 U.S. 1000, 95 S.Ct. 2398, 44 L.Ed.2d 667 (1975). The more specific requirements for

an allegation of conspiracy are that the pleader provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; "[i]t is not enough merely to state that a conspiracy has taken place." 2A *Moore's Federal Practice* ¶ 8.17[5] (2d ed. 1979); *Heart Disease Research Foundation v. General Motors*, 463 F.2d 98 (2d Cir. 1972); *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 701-02 (E.D.Pa.1973). Nevertheless, the pleader should be allowed considerable leeway, and the provision of further details may be left to discovery. 2A *Moore's Federal Practice* ¶ 18.17[5] at n. 5. On the whole, courts should be slow to dismiss an action on the pleadings, especially when antitrust violations are alleged. *Hospital Building Co. v. Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975), *rev'd on other grounds*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934, 87 S.Ct. 295, 17 L.Ed.2d 215 (1966); *Burch v. Goodyear Tire & Rubber Co.*, 420 F.Supp. 82 (D.Md.1976), *aff'd*, 554 F.2d 633 (4th Cir. 1977).

In light of those principles of pleading, the court is satisfied that the plaintiffs' amended complaint gives a sufficiently clear and succinct description of the alleged conspiracy, with enough details as to time and place, to give both Colgan and Miller notice of the basis of the claim against them. Although neither corporation is mentioned by name in the section of the complaint which describes the alleged antitrust violation in detail, paragraphs 4(e) and (f) of the complaint plainly assert that each corporation "has performed acts in furtherance of the conspiracies alleged herein." The more detailed explanation in paragraphs 20-25 provides ample notice of the time, nature and purported effects of the conspiracy. Although neither Colgan's nor Miller's precise role in the conspiracy is outlined, the discovery process is the proper tool for exploring such detail. In fact, discovery has revealed additional information which further convinces

the court that the plaintiffs can show some set of facts, based on the pleadings, that might entitle the plaintiffs to relief against Colgan and Miller. *See* Part V, *infra*.

Because a dismissal on the pleadings is unwarranted under the circumstances of this case, and because venue is proper in the District of Maryland as to both Colgan and Miller, the motion of those two defendants to dismiss the complaint as to them must be denied.

V. *Plaintiffs' and Defendants' Cross-Motions for Summary Judgment on the Plaintiffs' Claims*

The plaintiffs' motion for summary judgment on their own claims, as opposed to the defendants' counterclaims, seeks a declaratory judgment that Article Six of the NECA-IBEW National Agreement constitutes a *per se* violation of § 1 of the Sherman Act,[7] in that the agreement amounts to a conspiracy to fix, maintain and stabilize the cost of contracts with the IBEW. The defendants' cross-motion seeks summary judgment on the plaintiffs' price-fixing allegations, on the grounds that the allegations fail to state a claim on which relief can be granted. In the court's view, the undisputed facts presented in the record show that the defendants' agreement to set up and implement the National Electrical Industry Fund *was* a price-fixing agreement illegal *per se*. The plaintiffs are entitled to summary judgment on that issue, and the defendants' cross-motion must be denied.

On any motion for summary judgment, the moving party must show that there are no genuine disputes as to any material fact, and that the movant is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962). *See also Fli-Back Co., Inc. v. Phila-*

[7] Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

delphia Manufacturers Mutual Insurance Co., 502 F.2d 214, 218 (4th Cir. 1974). The starting point for an analysis of both the facts and the law in the present case is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). In *Socony*, the Court held:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. [*Id.* at 223, 60 S.Ct. at 844.]
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> . . . But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. . . . It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other . . . In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity.

Id. at 225 n.59, 60 S.Ct. at 845.

A. *The Agreement*

The existence of an agreement between NECA and the IBEW is undisputed. It is rare in an antitrust case that the court need not construe a combination or conspiracy solely from the speeches, correspondence and meetings of the defendants. In the present case, the court has before it not only voluminous records of such speeches, correspondence and meetings, but also a copy of the exact

terms of the defendants' agreement, reduced to writing and signed by representatives of NECA and the IBEW on December 8, 1976.

Although the fact of an agreement is undisputed, the application of the antitrust laws depends on *what* the defendants agreed to do. By its terms, Article Six of the National Agreement (quoted in Part I above) establishes the NEIF, and then provides that each individual employer will contribute to the fund 1% of his gross labor payroll every month. Most importantly, Article Six provides that the 1% payment obligation will be inserted into "[*a*]*ll* construction agreements in the electrical industry" (emphasis added). That language is critical, because it shows that the NEIF was to apply to *all* electrical contractors, and not just to those who were members of NECA or who were affiliated with NECA as nonmember signatories to Letters of Assent, Project Agreements or International Agreements.

The plain language of Article Six, indicating that *all* construction agreements were to be affected, is corroborated by the language of the National Agreement as a whole. The preamble states, "The *appropriate* contents of this agreement and the enabling clauses herein shall be inserted in all agreements between the parties and in all construction agreements between the Local Unions of the IBEW and the Local Chapters of NECA." (Emphasis added.) The preamble does not state unequivocally that *all* contents of the agreement will be inserted in only NECA-IBEW contracts. Articles Three, Four and Five, dealing with shift work, management rights and apprentice ratios, specifically provide that their language is to be inserted in agreements between local IBEW unions and local NECA chapters, while that language is conspicuously missing from Article Six. That distinction, combined with the qualifying word "appropriate" in the preamble, demonstrates that the parties agreed to insert the NEIF provisions in *all* contracts without regard to NECA affiliation.

That conclusion is further buttressed by a document entitled "Basic Understandings and Interpretations of the IBEW-NECA Agreement," also signed on December 8, 1976 by Robert Higgins for NECA and Charles Pillard for the IBEW. The memorandum clarifies how each article of the National Agreement is to be interpreted and applied. Under Article Six, the document states that "the intent of this Article is to insert the industry fund contribution language in all IBEW construction agreements containing the NEBF language . . . ." An affidavit of Marcus Loftis, Administrative Assistant to the International President of the IBEW, explains which contracts contained the NEBF language. Mr. Loftis submitted the affidavit to the United States District Court for the District of Alaska on July 1st, 1977 in connection with *Case v. IBEW*, 438 F.Supp. 856. Paragraph 7 of the affidavit states:

> Since the inception of the pension benefit contributions in 1946, both the affiliated construction Locals and the electrical contractors, be they affiliated members of Chapters of NECA, members of other employer associations, or independent contractors, have always included within the terms of their collective bargaining agreements the one percent gross payroll benefit contribution to NEBF.

Exhibit 48 to plaintiffs' motion for summary judgment. If the reach of the NEIF was to be as extensive as that of the NEBF, it is clear that the language of Article Six was not subject to the limiting provisions of the preamble or the other articles of the National Agreement.

That interpretation is also supported by a letter from Henry H. Glassie to Robert L. Higgins, Executive Vice President of NECA, on October 7, 1976. Mr. Glassie is an attorney whom Higgins had consulted on the question whether NECA's adoption and implementation of the National Agreement would require a formal amendment of NECA's bylaws. Mr. Glassie responded in his letter as follows:

> If the Industry Fund provided for in Article 6 of the agreement referred to in Proposal # 3 applied to NECA members as such, a change in the By-Laws would be involved. However, we are informed the contribution to this fund as provided in Article 6 will be required of all union electrical contractors whether they are members of NECA or not—indeed would be applicable to a company after resignation from NECA; and moreover, that the contribution will not be required of non-union members of NECA. Accordingly, on balance, it is our opinion that the adoption of Ordinary Proposal # 3 would not require the formality of an amendment of the By-Laws.[8]

There are other documents in the record which reinforce the conclusion that NECA and the IBEW intended to obtain NEIF payments from all electrical contractors employing IBEW labor. Among them are Exhibit 30 to the plaintiffs' motion, a letter dated October 26, 1976 from H. E. Autrey, then president of defendant Miller Electrical Company, to A. M. Scherffius of the E. I. duPont de Nemours Company; Exhibit 33, the November 1976 issue of Electrical Contractor Magazine; Exhibit 14, a NECA "Chapter Alert" dated December 20, 1976; Exhibit 28, a letter dated December 28, 1976 from Charles Pillard to "All Local Unions Who Have Agreements Containing the 1% NEBF Clause;" and Exhibit 31, a letter dated January 3, 1977 from Mark Hughes to Bernard Healey. The materials submitted by the defendants to support a dif-

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[8] After the plaintiffs submitted the letter to the court, the defendants took Mr. Glassie's deposition in order to establish what he had intended to say in the letter. Before he was deposed, the defendants told Mr. Glassie that a letter he had written in 1976 was going to be interpreted as implying that non-members of NECA would be forced to pay into the NEIF. Glassie deposition at 34. Because the deponent was thereby "primed" to refute that interpretation, and because the deposition was taken some three and one-half years after the letter was written, the letter is still persuasive support for the fact that the defendants meant to insert the NEIF provision into *all* electrical industry construction agreements.

ferent interpretation of Article Six are temporally far removed from the formation of the National Agreement itself, and are therefore so likely to be self-serving that in the court's view, they fail to create a genuine factual dispute.

B. *Anticompetitive Purpose*

Although it is clear *what* the defendants agreed to do, the question remains whether the purpose behind the agreement was to achieve some end forbidden by the antitrust laws. The plaintiffs contend that the NEIF provisions were designed to ensure that all electrical contractors employing IBEW labor would pay a higher price for procuring that labor, with the amount of the increase going to pay for industry services provided by NECA. The ultimate aim of the price manipulation, according to the plaintiffs, was to eliminate the competitive advantage in bidding which non-NECA contractors enjoyed by virtue of not having to include NECA dues in their cost of doing business. NECA was allegedly suffering from what the plaintiffs describe as a "Jehovah complex": the association felt it was providing valuable services to the entire electrical construction industry, and felt it was justified in compelling all the beneficiaries to pay for the services.

Because the crux of the plaintiffs' claim is an allegation of price-fixing, and because the plaintiffs allege that the price fixed was that of contracts with the IBEW, the court must decide the preliminary issue whether § 6 of the Clayton Act, 15 U.S.C. § 17, imposes a bar to the plaintiffs' action.

The first sentence of § 6 asserts that "[t]he labor of a human being is not a commodity or article of commerce."[9] Ordinarily, the courts have interpreted that

[9] The full text of § 6 reads:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be

sentence to exclude from the antitrust laws any alleged restraints on the labor market itself. *Carroll v. Protection Maritime Insurance Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Nichols v. Spencer International Press* 371 F.2d 332 (7th Cir. 1967); *Kennedy v. Long Island Railroad Co.*, 319 F. 2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830, 84 S.Ct. 75, 11 L.Ed.2d 61 (1963). *See also* A. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U.Pa.L.Rev. 252, 254 (1955). The primary rationale behind the court's interpretation is that Congress in § 6 meant to guarantee that the lawful activities of labor organizations would not be subject to the antitrust laws, and to that end, Congress excluded the labor market altogether as one in which trade could be restrained. 51 Cong.Rec. 14018 (1914). Consequently, there can be no antitrust violation unless some restraint on competition in a commercial market for goods or services is at issue. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 60 S.Ct. 982, 993, 84 L.Ed. 1311 (1940); *Armco Steel Corp. v. UMW*, 505 F.2d 1129, 1134 (4th Cir. 1974); *Kennedy v. Long Island Railroad Co., supra*, 319 F.2d at 373.

The defendants argue that the price of a contract for labor is indistinguishable from the price of labor itself, and that the plaintiffs' antitrust allegations therefore cannot survive application of § 6 of the Clayton Act. Although the court would ordinarily agree, the facts of this case make it possible to distinguish between the price or cost of labor and the price of procuring a contract for that labor.

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construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Under most circumstances, the cost of labor is the amount an employer pays, *to the benefit of his employees*, in return for their services. The ultimate price of the labor may be broken down into several components, including wages, health care benefits, pension contributions and bonuses. Yet each component is a benefit to the employee, paid in exchange for his labor. Any supposed restraints on the determination of the aggregate price are not within the ambit of the antitrust laws, because the "item" whose price is involved is the labor of a human being.

In the present case, however, one element of the price electrical contractors were to be required to pay for IBEW labor was not to be paid to employees at all. NEIF contributions were to be paid directly into a fund controlled wholly by NECA and set up for the purpose of financing NECA's services. The benefits flowing from the payments were to go to *employers* in the industry, whether or not the employers would otherwise want the benefits or choose to purchase them. In no sense does Article Six of the National Agreement reflect an amount that IBEW laborers charge *for their labor*. It instead represents a charge which an employer group and the union agreed *all* employers in the electrical construction industry would have to pay, in addition to employee compensation, in order to procure a contract with the IBEW. In the court's view, the price of a labor contract under those circumstances is distinguishable from the price of labor itself, and might therefore be subject to illegal manipulation.

Nevertheless, the distinction would be irrelevant if the plaintiffs were alleging an illegal restraint on the labor market itself. In other words, if the plaintiffs claimed that manipulation of the cost of procuring labor interfered with their freedom or ability to hire workers, the court would have no trouble dismissing the claims on the authority of *Kennedy v. Long Island Railroad*, *supra*,

Apex Hosiery, supra, and *Armco Steel, supra.* In the instant case, however, the heart of the complaint is the alleged restraint on competition in the market for electrical construction services. Those services are clearly within a commercial market subject to the antitrust laws. Because of the combination of circumstances here—the price of a labor contract is distinguishable from the price of labor *and* the plaintiffs do not allege any restraint on competition in the labor market itself—the court finds that § 6 of the Clayton Act is no bar to the present action.

In order to link the alleged manipulation of the price of labor contracts with the alleged restraint on competition, and in order to determine that Article Six of the National Agreement constitutes a price-fixing conspiracy illegal *per se,* the court must be satisfied that there is no genuine factual dispute as to the defendants' anti-competitive purpose in establishing and implementing the NEIF. *United States v. Socony, supra,* 310 U.S. at 223, 60 S.Ct. at 844; *United States v. National Society of Professional Engineers,* 555 F.2d 978, 983 (D.C.Cir. 1977), *aff'd,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *State of Arizona v. Cook Paint & Varnish Co.,* 391 F. Supp. 962, 965-67 (D.Ariz. 1975), *aff'd,* 541 F.2d 226 (9th Cir. 1976), *cert. denied,* 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977).

The plaintiffs take the position that the "NECA defendants"—that is, all defendants except the IBEW and Charles Pillard—conceived of the NEIF as a means to eliminate the competitive bidding advantage non-NECA-members enjoyed by virtue of not having to pay NECA dues to support the association's services to the industry. By ensuring that every contractor in the electrical construction industry employing IBEW labor[10] contributed

[10] The IBEW is virtually the only union in the country to have organized workers in the electrical construction industry. Almost every union job in the industry employs IBEW labor. Plaintiff's

to the cost of NECA services according to a defined formula, the NECA defendants allegedly sought to equalize every contractor's cost of doing business and destroy the non-NECA-members' competitive advantage. In order to implement the plan, NECA enlisted the help and bargaining power of the IBEW, which agreed to the scheme as a concession to management, in return for the advantageous provisions of the National Agreement concerning pension benefits, shift work and apprentice ratios.

The record reveals that there is no genuine factual dispute over the accuracy of the plaintiffs' contentions. One of the most compelling portions of the record is the transcript of a speech made by Robert Colgan, then President of NECA, to the District 1 NECA Council meeting at Sutton, Massachusetts on September 10, 1976. Although NECA and the IBEW had announced their proposed agreement in the spring of 1976, it could not become official until approved by the local chapters. Accordingly, Colgan and other NECA officials traveled around the country in the summer and fall of 1976, meeting with the local chapters and encouraging them to approve the agreement.

In his September 10th speech in Massachusetts, Colgan discussed how the insertion of the NEIF into collective bargaining agreements would eliminate non-NECA contractors' cost advantage:

> I don't want a national constructor going to our customers and say I have an international agreement and I can employ your people, or I can employ IBEW people and *I have an advantage over them because I don't have to pay any percentage on top of my payroll.* Now many of you say who's going to assure that the national constructors will pay this bill. It isn't a hundred percent positive that the national

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Memorandum in Support of Motion for Determination of This Suit as a Class Action, at 7-8.

constructors will pay this bill, but they have international agreements with the very people that we're negotiating this agreement with, and in the majority of the cases they agree to operate under the terms of the local bargaining agreement, and by the way this is if it becomes part of a bargaining agreement this is a legal industry fund and it has been put to the test before it was every [sic] put into this proposal. I'm saying that I think that the work that we have done over the years deserves somebody else who's getting the benefits from it to help pay for the way that we have helped this industry grow. *I have all of my life I have always resented those people who felt if it was an opportunity for them to remain on the outside to employ IBEW people and say I don't have to pay that bill, if you get a NECA contractor it's going to cost you more money.* I want that in the bargaining agreement and as you all know most of it is in the bargaining agreement. I want it in the bargaining agreement because so that the people who agree to operate by the local agreements will abide by that agreement. That's the way I feel about it. That is part of the dream that I have and I will admit there are going to be if it would be passed and I know many of you have taken votes against it. If it were passed it will be put to the test, but in general you will find that the people are willing to accept the other conditions that they get with this along with abiding by the local agreements. *I think it's an advantage to you as contractors to stabilize your industry in this manner.* I realize that no one can come out and compete against the non-union rates but they can compete against some of the conditions that non-union people will be able to operate under better able to operate under. I firmly believe that we can get closer to them and closer to our customers if we do some of the things they have been complaining about. And yet they are

> the very same people that are telling us that we are raising their cost. I do not believe we are raising their costs. *I believe we are putting an adder on top of what their effective lower cost is.*

Exhibit 7 to Plaintiffs' Motion for Summary Judgment at 6-7 (emphasis added). As the record makes clear, the "adder" was to be applied to *all* contractors with the IBEW, not just contracts negotiated between NECA and the union.

The anticompetitive purpose so apparent in Mr. Colgan's speech is further documented by affidavits submitted and statements of counsel made in connection with some of the collection cases pending in other courts. Each of three affidavits sworn to by NECA chapter managers contained the following explanation of the necessity for collecting NEIF payments:

> Over the years of my association with the electrical contracting industry, I have frequently seen situations where the difference between the successful bid for a contract and the next lowest bid was much less than 1% of the successful contractor's anticipated payroll expenses for the project. This is because material and labor costs vary little between competing contractors. If the Howard P. Foley Company and other contractors are permitted to evade payment of 1% of their payroll costs to the NEIF they will, thus, be placed in a highly unfair competitive position with respect to other contractors who continue to observe their contractual obligation in this regard.

Exhibits 2, 3 and 4 to Plaintiffs' Motion for Summary Judgment, at pages 5, 4 and 4-5 respectively.

At a hearing in a collection case in the Federal District Court in Los Angeles, counsel for the NEIF, Stanley Tobin, insisted that the 1% payments required under

Article Six could have a decisive effect on a contractor's competitive bidding advantage.

> MR. TOBIN: . . . What is important here, your Honor, is that these national contractors [who refuse to pay into the NEIF] . . . are going to get an extra boost. *They are going to be able to be so competitively placed that they have an advantage over the local contractors, members of the local [NECA] chapter.* They will not have to pay pending all this litigation which can go on for years in Maryland. They will not have to pay one cent towards this fund which every other contractor here will have to pay.
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> MR. TOBIN: . . . That is exactly the point. In the interim [*the contractor refusing to pay*] *is getting a competitive advantage over everyone else. He, therefore, gets the bids. He can beat them out.* There is nothing that anybody can get from it thereafterwards. We are coming in here merely for his allowance. That is number one.
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> Number two, and perhaps even more important, he doesn't pay his competitors—the hundreds and hundreds of other electrical contractors that are situated in Southern California—they see he gets away with that one percent. *That one percent is a big thing.*

Exhibit 5 to Plaintiff's Motion for Summary Judgment at 8, 12 (emphasis added).

The undisputed facts discussed so far establish that NECA and the IBEW entered into a written agreement to add a surcharge, determined by a uniform formula, to the cost of procuring *all* contracts with the IBEW in the electrical construction industry. The facts also establish that the purpose of the agreement was to eliminate competition between NECA members and non-NECA-

members in bidding for projects in the industry. In the court's view, those facts are sufficient to establish a price-fixing scheme which is *per se* illegal under the line of authority rooted in *United States v. Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927), expressed most clearly in *United States v. Socony*, *supra*, and reaffirmed in cases such as *United States v. Container Corporation of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); and *Catalano, Inc. v. Target Sales, Inc.*, —— U.S. ——, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980). In order to clarify its view, the court will address some of the defendants' arguments that there has been no *per se* violation of § 1.

C. *The Defendants' Arguments*

1. *Applicability of the* Per Se *Rule*

One of the defendants' arguments is that the conduct of NECA and the IBEW alleged to be illegal does not fall within any of the categories the courts have already deemed to be *per se* violations of the Sherman Act. There are two parts to the argument: First, the National Agreement cannot amount to a price-fixing conspiracy illegal *per se* because it is neither a horizontal agreement between competitors nor a vertical agreement between links in a chain of distribution; and second, the court needs to know more about the actual effect of the National Agreement on competition before the court can determine whether the arrangement should be classified as a *per se* violation. *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963); *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1192 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977). The defendants conclude that if the scheme were tested under the standards set out in *Northern Pacific Railroad Co. v. United States*, 356 U.S.

1, 78 S.Ct. 514, . L.Ed.2d 545 (1958), it would not warrant *per se* treatment, but would instead have to be analyzed under the Rule of Reason.[11]

The court is not persuaded that an arrangement designed to fix the price of procuring labor contracts cannot be a *per se* illegal price-fixing agreement merely because it is neither horizontal nor vertical in the traditional sense. In the three district court cases cited by the defendants, the courts rejected the *per se* price-fixing theories not just because the agreements at issue were neither horizontal nor vertical, but because there was no indication of any interference with free market forces through price manipulation.[12] In the present case, on the other hand, the ultimate purpose of the National Agreement was to interfere with the price NECA members' competitors could charge for their services. By putting an "adder" on the competitors' cost of procuring labor, NECA through its agreement with the IBEW aimed to stabilize operating costs in the industry and thereby eliminate bidding competition.

The case of *United States v. General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321, 16 L.Ed.2d 415 (1966), makes it clear that it is such *restraint on price competition*, rather than the characterization of an agreement

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[11] In *Northern Pacific*, the Supreme Court explained the principle of *per se* unreasonableness as follows:

> However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. 356 U.S. at 5, 78 S.Ct. at 518.

[12] *West Texas Utilities Co. v. Texas Electric Service Co.*, 470 F. Supp. 798 (N.D.Tex. 1979); *Mortenson v. First Federal Savings & Loan*, 79 F.R.D. 603 (D.N.J. 1978); *DuPont Glore Forgan, Inc. v. A T & T*, 437 F.Supp. 1104, 1127-28 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970, 99 S.Ct. 465, 58 L.Ed.2d 431 (1978).

as horizontal or vertical, which is the essence of a *per se* violation. In *General Motors*, three associations made up of franchised Chevrolet dealers in the Los Angeles area enlisted General Motors' help in eliminating a practice whereby other Chevrolet dealers worked with discounters to sell cars to the public at prices well below what dealers normally charged their customers.

The Court said there could be no doubt that the *effect* of the combination between General Motors and the dealer associations was to restrain trade. The Court continued:

> We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E.g., United States v. Parke, Davis & Co.*, 362 U.S. 29, 47, 80 S.Ct. 503, 513, 4 L.Ed.2d 505; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129. And the *per se* rule applies even when the effect upon prices is indirect. *Simpson v. Union Oil Co.*, 377 U.S. 13, 16-22, 84 S.Ct. 1051, 1054-1057, 12 L.Ed.2d 98; *Socony-Vacuum Oil Co., supra.*
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> There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. . . .
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> The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competi-

> tors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

384 U.S. at 147-48, 86 S.Ct. at 1331-32.

Nowhere in its opinion did the Court even imply that price competition deserved "special solicitude" only when the alleged restraint was clearly horizonal or vertical. Nor did the Court consider it important to characterize the particular combination at issue, which had some horizontal elements (dealers combining with other dealers), some possibly vertical elements (franchisees combining with franchisor), and some highly unusual elements. As long as the price restraint was clear, the particular method of implementing it was not important. *See United States v. Socony, supra*, 310 U.S. at 222, 60 S.Ct. at 844 (agreements to raise or lower prices would be illegal "whatever machinery for price-fixing was used"); *United States v. Container Corporation of America, supra*, 393 U.S. at 337, 89 S.Ct. at 512.

Like the Supreme Court in *General Motors*, this court does not believe it can close its eyes on the defendants' clear purpose to restrain price competition. It is true that the National Agreement may not fall neatly into the most familiar molds of price-fixing agreements. In that vein, the defendants cite *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), in support of their argument that a business arrangement should not be placed in a *per se* category before the courts have gained considerable familiarity with the arrangement's effects and possible advantages. However, in *Broadcast Music*, the Court was dealing with blanket licensing for musical compositions protected by the copyright laws. The activities alleged to be illegal involved practical problems peculiar to the market for musical compositions. 441 U.S. at 10-16, 99 S.Ct. at 1557-1560. Because the Court had some doubt that blanket licensing *facially* appeared to restrict competition or competitive pricing, the Court declined to apply the *per se* rule. In

contrast, this court has little difficulty concluding that the collaborative effort by members of NECA, through their association, to enlist the aid of the IBEW in implementing a designedly anticompetitive scheme is the kind of horizontal concerted activity recognized under § 1 of the Sherman Act as particularly dangerous to price competition. The Court therefore remains persuaded that Article Six of the National Agreement is *per se* illegal.

2. *Coercion or Imposition*

The *Broadcast Music* case gives rise to another argument the defendants have made repeatedly in response to the allegations that Article Six amounts to *per se* illegal price-fixing. The theory is that the plaintiffs can prove no violation unless they establish that the defendants coerced the plaintiffs into accepting the NEIF provisions, or imposed upon the plaintiffs a contract containing the industry fund. The defendants rely principally on the Supreme Court's finding in *Broadcast Music* that the plaintiff had a "real choice" between obtaining a blanket license from the defendants at a standard price, and obtaining individual licenses from the composers themselves. Partly because those alternatives were available, the Court declined to categorize the blanket license as *per se* illegal.

That rationale in *Broadcast Music*, as well as the reasoning in the other cases cited by the defendants, is not applicable to the present case. The Supreme Court in *Broadcast Music* did not elaborate on the implications of "choice" other than to say its presence was one of several reasons not to find a *per se* violation under the circumstances. As this court has already pointed out, *Broadcast Music* involved a highly unusual fact situation. The most clearly distinguishing fact in the present case is the existence of a clear, written agreement to manipulate prices, with the equally clear intent of eliminating com-

petition from non-NECA contractors. It is the agreement itself, entered into with an anticompetitive purpose, which is illegal under the Sherman Act. The possibility that the IBEW would, if pressed, negotiate separate collective bargaining agreements without the NEIF provision cannot change the illegal character of the undisputed conspiracy between the IBEW and NECA.

The existence of the conspiracy also distinguishes the present case from *Iodice v. Calabrese*, 345 F.Supp. 248, 268 (S.D.N.Y. 1972), *modified*, 512 F.2d 383 (2d Cir. 1975), in which the district court found that there was no agreement between the union and the contractors' association requiring the union to secure certain terms in all its collective bargaining agreements. Here the IBEW *did* agree to insert the NEIF provision in *all* construction agreements in the industry. In short, the court rejects the theory that a showing of coercion or imposition is a prerequisite to proving a *per se* illegal price-fixing arrangement.[13]

3. *Anticompetitive Effect*

Another argument the defendants raise in order to rebut the plaintiffs' contentions is that there can be no finding of a violation absent a showing of the anticompetitive *effect* of the NEIF provisions. It is clear that where price-fixing is concerned, the antitrust violation inheres in the agreement itself and in its illegal purpose; the very function of the *per se* rule is to obviate an exhaustive inquiry into the effects of price-fixing in each individual case. *United States v. Socony, supra*, 310 U.S. at 222, 60 S.Ct. at 843; *National Society of Professional*

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[13] The majority of the cases the defendants cite in support of their "coercion" theory involve illegal boycotts or refusals to deal. The element of coercion inherent in those cases is simply not an issue in a price-fixing case. *See In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2976, 53 L.Ed.2d 1094 (1977).

Engineers v. United States, supra, 435 U.S. at 692, 98 S.Ct. at 1365; *Northern Pacific Railroad Co. v. United States, supra*, 356 U.S. at 5, 78 S.Ct. at 518; [14] Sullivan, Handbook of the Law of Antitrust § 71 at 194-95 (West 1977) (hereinafter "Sullivan"). As the Fourth Circuit recently stated in *United States v. Society of Independent Gasoline Marketers of America*, 1977-2 Trade Cases ¶ 61,753 (4th Cir. 1979):

> Since in a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the anticompetitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries*, 273 U.S. 392, 397 [47 S.Ct. 377, 379, 71 L.Ed. 700] (1926).

The defendants correctly point out that the cases deeming inquiry into anticompetitive effect unnecessary are criminal cases brought by the government, and that the prerequisites for a plaintiff's recovery in a civil case are somewhat different. Part II of this opinion recognizes that a civil plaintiff has no standing to sue unless it can show direct injury to its business or property, 15 U.S.C. § 15, or threatened loss or damage, 15 U.S.C. § 26, proximately caused by a violation of the antitrust laws. The defendants argue that the plaintiffs cannot show the requisite harm or threat unless they prove the

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[14] In 356 U.S. at 5, 78 S.Ct. at 518, the Court said:

> . . . This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

anticompetitive effect of the National Agreement on the electrical construction industry.

In the court's view, the defendants misconstrue the burden of proof on a civil plaintiff in an antitrust case. Although the crux of a private action is individual injury, *Windham v. American Brands*, 565 F.2d 59, 66 (4th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1605, 56 L.Ed.2d 58 (1978), there is no requisite that the injury be shown by proving the anticompetitive effect of the defendants' agreement. The proof required will depend on the injury alleged. *See* P. Areeda, *Antitrust Analysis, Problems, Text, Cases* ¶ 159 (2d ed. 1974 and Supp. 1978) (hereinafter "Areeda"). The essential prerequisites to recovery are that the plaintiff's injury be causally related to the activity which violates the antitrust laws, and that the injury be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).[15] In a price-fixing case, the measure of the plaintiff's injury may be the full amount of the "overcharge;" that is, the difference between the fixed price and the price that would otherwise have prevailed. *Phillips v. Crown Central Petroleum Corp.*, 395 F.Supp. 735, 768 (D.Md.1975); *Wall Products Co. v. National Gypsum Co.*, 357 F.Supp. 832, 844 (N.D.Cal.1973); *Ohio Valley Electric Corp. v. General Electric*, 244 F.Supp. 914, 933 (S.D.N.Y.1965); Sullivan, § 251 at 785-86; Areeda, ¶ 159 at 70-71. *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). Although determining

[15] In *Brunswick*, the court went on to say, "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489, 97 S.Ct. at 697. That language, however, was particularly applicable to the facts of the *Brunswick* case, which involved alleged violations of the anti-merger provisions of the Clayton Act, and not alleged price-fixing violations.

what the price would have been absent a conspiracy may require some speculation, a wrongdoer should not be permitted to invoke the uncertainty created by his own wrong and use it to preclude a plaintiff's recovery. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-580, 90 L.Ed. 652 (1946); *Ohio Valley Electric v. General Electric*, *supra*, 244 F.Supp. at 933-34.

In the present case, the plaintiffs claim that their injury is the amount of the contributions they have paid into the NEIF; and that their threatened loss or injury is their as yet unfulfilled obligation to pay into the fund. That injury is causally related to the defendants' illegal agreement, and flows from that which makes the defendants' conduct unlawful, namely the addition of a 1% "adder" on the cost of procuring IBEW contracts. The amount of the overcharge is ascertainable without unreasonable speculation, because it is expressed in terms of a percentage of employer payroll. The defendants claim it is practically impossible to estimate what the terms of collective bargaining agreements would have been absent the NEIF, and that it is therefore equally difficult to calculate any overcharge. But to allow that argument to prevail would be to ignore the principle of *Bigelow* stated above. In short, the plaintiffs have made an adequate showing of the *fact* of their injury stemming from the defendants' conduct. There is therefore no need for proof of the anticompetitive effects of Article Six of the National Agreement.[16]

4. *The Labor Exemption*

A fourth argument which the defendants raise in order to show there has been no *per se* violation is that the agreement between NECA and the IBEW falls within the "labor exemption" from the antitrust laws. Although

[16] The actual amount of each plaintiff's damages must be determined at future proceedings.

rooted in the Norris-LaGuardia Act,[17] and §§ 6 and 20 of the Clayton Act,[18] the exemption is non-statutory, developed by the courts in an effort to balance the national labor policy against the apparently conflicting antitrust policy. The central question is when the activities of a labor union are to be construed as a violation of the antitrust laws.

The exemption first began to take shape in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940), in which the Supreme Court said:

> [A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

310 U.S. at 503-04, 60 S.Ct. at 997-98. In *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), the Court considered "[W]hether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs" was within the *statutory* exemption of § 20 of the Clayton Act. *Id.* at 227, 61 S.Ct. at 464. Justice Frankfurter wrote:

> So long as a union *acts in its self-interest and does not combine with non-labor groups*, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232, 61 S.Ct. at 466 (footnote omitted; emphasis added).

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[17] 29 U.S.C. §§ 104, 105 and 113.

[18] 15 U.S.C. § 17 and 29 U.S.C. § 52.

The problem of a union combining with non-labor groups arose directly in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). Electrical contractors, electrical equipment manufacturers and the union had engaged in concerted activity to assure that the contractors would purchase only equipment manufactured in the New York City area, and that the manufacturers would sell their equipment in New York City only to contractors employing IBEW labor. There was no question that the union's aim in participating in the combination was to pursue its own interests and those of its members. *Id.* at 799-800, 65 S.Ct. at 1535. After reviewing the history of the tension between the antitrust laws and Congress' labor legislation, the Court framed its analysis in these terms:

> The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Id. at 806, 65 S.Ct. at 1538.

Having decided that the union's activities, if taken alone, would *not* violate the Sherman Act, and that the contractors' and manufacturers' activities, absent union participation, *would* violate the Act, the Court concluded that a union could not legally aid and abet businessmen who were committing antitrust violations. "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808, 65 S.Ct. at 1534. "A business monopoly is no less such because a union participates, and

such participation is a violation of the Act." *Id.* at 811, 65 S.Ct. at 1541.

The next cases to develop the labor exemption were *Pennington v. UMW*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and its companion case, *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965). In *Pennington*, the Court considered the question whether a union could agree upon certain wage terms with a multi-employer bargaining unit and then agree with the employer group to seek the same wage terms from employers outside the unit. The complaint alleged that the union had entered into a conspiracy with large mine operators to impose agreed-upon wage scales on smaller, nonunion operators regardless of their ability to pay, with the purpose of driving the smaller companies out of business.

The Court found that the union's activity was not exempt from the antitrust laws.[19] Justice White wrote:

> We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the

[19] Justice White wrote the "opinion of the Court," joined by two other Justices. Justice Douglas wrote a concurrence joined by Justices Black and Clark; Justice Goldberg and two other Justices concurred in the result but dissented from the Court's opinion.

> scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

381 U.S. at 665-66, 85 S.Ct. at 1591 (footnote omitted). After weighing the concerns of the antitrust laws with the relevant labor policies, Justice White's group concluded that the agreement to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws. *Id.* at 669,[20] 85 S.Ct. at 1592.

In *Jewel Tea*, however, *Pennington's* companion case, the Court found that the agreement at issue *was* exempt from the antitrust laws.[21] The unions had obtained an agreement from a multi-employer bargaining group concerning marketing hours for food store meat departments. The unions then sought and obtained the same terms from an employer outside the bargaining group, but did so because the unions believed the terms would serve the unions' own best labor interests. They had not agreed with the employers in the bargaining group to seek the same terms from any other employer. 381 U.S. at 688, 85 S.Ct. at 1601. The Court defined the issue in the case to be

> whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of

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[20] Justice Douglas' opinion differed from Justice White's primarily in that it said a union would be liable for an antitrust violation if the union's agreement with the employers "was made for the purpose of forcing some employers out of business." 381 U.S. at 673, 85 S.Ct. at 1595. The issue of predatory intent is discussed in more detail, *infra*.

[21] The Court split into the same three groups of three as in *Pennington*, with White writing the Court's opinion, Goldberg concurring only in the judgment, and Douglas dissenting.

> their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.

Id. at 689-90, 85 S.Ct. at 1602. (footnote omitted).

The Court's most recent treatment of the labor exemption was in *Connell Construction Co. v. Plumbers & Steamfitters Local #100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). The respondent union was party to a collective bargaining agreement with a group of mechanical contractors in Dallas. With the goal of organizing as many plumbing and mechanical subcontractors as possible, the union sought to have general contractors working in Dallas sign an agreement under which they would award subcontracts only to companies whose employees the union represented. If a general contractor refused to sign, the union picketed the company. At no time did the union represent or seek to represent the employees of the companies it picketed.

The Court concluded that the agreements between the union and the general contractors were not exempt from the antitrust laws.

> This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

421 U.S. at 625, 95 S.Ct. at 1836.

Any application of the leading Supreme Court labor exemption cases to the facts of the present case must be done in light of the recent Fourth Circuit decision in

Smitty Baker Coal Co., Inc. v. UMW, 620 F.2d 416 (4th Cir. 1980). In *Smitty Baker*, the Fourth Circuit set out the requirements for proving an antitrust violation in what the court called a "*Pennington*-type case." Emphasizing the distinction between the applicability of the labor exemption and the actual existence of an antitrust violation, the court said:

> To repeat: it is not enough that the Union may have entered into a contract with a multi-employer unit in a national industry to establish an antitrust violation by the Union or, for that matter, the employer-group. That may in some cases take the action out of the exemption enjoyed by labor, but it will not *per se* amount to an antitrust violation. To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.

620 F.2d at 431-32.

The defendants argue that the language quoted above precludes any finding that the National Agreement violated the antitrust laws. However, the Fourth Circuit's opinion must be analyzed in two parts: first, for what it says about the labor exemption, and second, for what it says about actual proof of a violation. That two-part analysis will show that the defendants do *not* fall within the exemption, and that the National Agreement amounts to a *per se* violation of § 1 of the Sherman Act as a matter of law.

The court in *Smitty Baker* did not focus its attention on interpreting the labor exemption. Because the court

concluded that there had been no conspiracy which would amount to a violation, the applicability of the exemption was not brought directly into issue. Accordingly, the case does not shed any new light on the question at the heart of the labor exemption: under what circumstances does the national labor policy outweigh the national antitrust policy, and dictate that an agreement which would otherwise run afoul of the Sherman Act be held immune from the provisions of that Act?

Smitty Baker instead concentrates on what a plaintiff must prove in order to make out an antitrust violation in a "*Pennington*-type case," focusing on the requirement of predatory intent. This court is satisfied that as the Fourth Circuit defined the *Pennington* model in *Smitty Baker*, the present case does not fit the mold, and is therefore not subject to the same requirements of proof. The model is described as follows:

> [The *Pennington*] doctrine requires (a) an agreement between the Union and an employer-group consisting of a substantial number of the larger employers in an industry to establish a wage scale for the employees-of-the-group-members-of-the Union, (b) which wage scale the Union and the employer group knew that the marginal employers in the industry could not afford, and (c) which wage scale the Union undertook to impose on the marginal nonmember operators, (d) with the intent to drive these marginal operators out of business and to remove them as competitors of the employer-group. And this is the view of the *Pennington* model as taken in other decisions and as expressed by commentators.

620 F.2d at 432-33. The court then noted that the model *had* to be so defined in order to avoid making a mockery of the statutory labor exemptions.

The facts of the case at bar do not require application of the "*Pennington* doctrine" as the Fourth Circuit has

defined it. The agreement between the IBEW and NECA has nothing to do with a wage scale, but instead concerns an industry fund whose proceeds were to benefit only NECA and the willing and unwilling recipients of NECA services. While the determination of a wage scale is a central and intimate concern of organized labor, promotion of an employer-oriented industry fund is not. As *Smitty Baker* teaches, a union's activities concerning wages deserve special solicitation under the national labor policy, and special safeguards against unwarranted application of the national antitrust policy. The same is not necessarily true of a union's agreement to assist an employer in implementing an intentionally anticompetitive scheme.

Unlike the plaintiff in *Smitty Baker*, the plaintiffs here have shown a clear, unequivocal agreement between the union and the employer group, and have demonstrated that the purpose of the agreement was to eliminate competition between NECA and non-NECA contractors in the electrical construction industry. This court cannot read *Smitty Baker* to hold that a union can *never* be liable under the antitrust laws unless the requirements of the *Pennington* doctrine are met. Where, as here, the plaintiff has made out a *per se* § 1 violation under the *Socony* doctrine and has demonstrated the defendant's anticompetitive purpose; and where, as here, the union activities in question do not directly involve wages or other terms and conditions of employment;[22] the union's liability must depend on the application of the nonstatutory labor exemption to the particular facts involved.

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[22] The defendants argue that Article Six of the National Agreement *is* related to employment conditions because it represents a union concession to management in return for increased pension benefits, a shift clause and an apprentice ratio. If the court accepted that argument, any union undertaking would enjoy antitrust immunity as long as it was contained in a collective bargaining agreement. The court knows of no basis for so broad a holding.

Taking the Supreme Court's definitions of the non-statutory exemption as a whole, as they are expressed in the cases discussed at pp. 539-541, *supra*, it appears to this court on balance that the policies behind the antitrust laws must take precedence over whatever labor considerations are involved in the present case. In *Hutcheson*, *supra*, 312 U.S. at 232, 61 S.Ct. at 466, the Court noted that the exemption applied so long as the union acted in its self-interest and did not combine with non-labor groups; here the IBEW has combined with an employer group to promote an industry fund which was not designed to serve union interests. In *Allen Bradley*, *supra*, 325 U.S. at 808 and 811, 65 S.Ct. at 1539 and 1540, the Court condemned union participation in the creation of business monopolies and in the control of marketing goods and services; here the IBEW threw its weight behind what was in essence a business group's scheme to control the marketing of electrical construction services. In *Pennington*, *supra*, 381 U.S. at 665-66, 85 S.Ct. at 1590-1591, Justice White found that a union forfeited its exemption when it agreed with one employer to seek the same wages, hours or other employment conditions from other employers; here the IBEW agreed to require the NEIF language in *all* contracts in the electrical construction industry. As this court has already noted, the National Agreement is even more susceptible to the antitrust laws than the agreement in *Pennington*, because Article Six does not concern wages or other terms and conditions of employment. It instead concerns the price of contracts with the IBEW, and bidding competition in the industry. In *Jewel Tea*, *supra*, 381 U.S. at 689-90, 85 S.Ct. at 1601-1602, the Court made it clear that prices were *not* intimately related to wages and working conditions.[23] It is a fair inference from *Jewel*

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[23] As the Court explained more fully in *American Federation of Musicians v. Carroll*, 391 U.S. 99, 113, 88 S.Ct. 1562, 1571, 20 L.Ed.2d 460 (1968), the question is whether an agreement is "in-

Tea, supra, 381 U.S. at 690, 85 S.Ct. at 1602, that the IBEW's agreement to obtain the NEIF provision from nonmembers of NECA, at the behest of and in combination with NECA, does not fall within the protection of the national labor policy, and is therefore not exempt from the Sherman Act. The Court's language in *Connell, supra*, 421 U.S. at 625, 95 S.Ct. at 1836, is applicable here: the NECA-IBEW agreement is the kind of direct restraint on the business market, whose potential anticompetitive effects "would not follow naturally from the elimination of competition over wages and working conditions."

In short, the IBEW's role in agreeing to implement Article Six of the National Agreement raises no labor policy issues important enough to outweigh the strong, unequivocal policy embodied in the Sherman Act and in the line of cases beginning with *United States v. Socony-Vacuum Oil*, condemning price-fixing agreements as *per se* illegal.

D. *Conclusion*

For all the foregoing reasons, the court has concluded that it must grant the plaintiffs' motion for summary judgment, and declare Article Six of the National Agreement illegal *per se*. For the same reasons, the defendants' motions for summary judgment on the plaintiffs' primary claims must be denied. In granting the plaintiffs' motion, the court is mindful of the cases from both the Supreme Court and the Fourth Circuit holding that summary judgment is often inappropriate in antitrust cases, where "motive and intent play leading roles," or where "the issue of intent relates to an ambiguous contract or document." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458

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timately bound up with the subject of wages," even if in *form* the agreement concerns prices. This court remains persuaded that the NEIF provision had nothing to do with wages.

(1962); *Morrison v. Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979); *Cram v. Sun Insurance Office*, 375 F.2d 670 (4th Cir. 1967). However, it is clear that the summary judgment motion has a place in antitrust cases. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-1593, 20 L.Ed.2d 569 (1968); *White Motor Co. v. United States*, 372 U.S. 253, 259, 83 S.Ct. 696, 699, 9 L.Ed.2d 738 (1963). In the present case, the court has considered voluminous briefs and documents, and has heard several days of oral argument on the summary judgment motions. The written and oral presentations have raised no issue which the court considers a genuine dispute as to a material fact: the existence of the National Agreement is undeniable, and its purpose is clear from the language of the agreement itself as well as from the contemporaneous documents. In the court's view, it is therefore appropriate to declare Article Six of the agreement illegal as a matter of law.

VI. *Plaintiffs' Motion for Class Certification*

Plaintiffs Commonwealth Electric Company (Commonwealth) and the Howard P. Foley Company (Foley) seek to have the present case certified as a class action on behalf of a class of plaintiffs defined as follows:

> All electrical contractors which, since July 1, 1977, (a) are not members of the National Electrical Contractors Association or its chapters and (b) have performed electrical construction work using electrical workers obtained and employed under the terms of "Inside" or "Outside" collective bargaining agreements with local unions affiliated with the International Brotherhood of Electrical Workers, AFL-CIO, which agreements contain or incorporate by reference the provisions of Article Six of the NECA-IBEW National Agreement.

Commonwealth and Foley are the purported representatives of the class.

A motion for class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. In order to prevail, the movant must show that all the requirements of Rule 23(a) are met, and that the requirements of part 23(b)(1), (b)(2) *or* (b)(3) are met as well. Commonwealth and Foley maintain that class certification is appropriate in this case under either 23(b)(2) or 23(b)(3). Accordingly, the pertinent provisions of Rule 23 are these:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent

and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Having tested the requirements of Rule 23 against the arguments of all the parties, the court has concluded that certification of the class as the plaintiffs have defined it would be appropriate under Rule 23(b)(3). The court will address each requirement in turn, and explain how the plaintiffs have demonstrated their compliance with each one.

A. *Numerosity*

By the plaintiffs' estimation there are approximately 7,800 electrical contractors which fall within the defined class. That number results from a comparison between the "IBEW Agreement Files," which identify all electrical contractors bound by collective bargaining agreements containing the NEIF provision, and the NECA membership list. Exhibit X to the plaintiffs' motion for class certification. The plaintiffs have therefore shown with adequate specificity that the class members are too numerous to make joinder practicable. *Cf. In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552 (D.Md.1978); *Predmore v. Allen*, 407 F.Supp. 1053, 1064 (D.Md.1975); *In re Plywood Anti-Trust Litigation*, 76 F.R.D. 570, 578 (E.D.La.1976).

The defendants' argument that numerosity has not been established rests on their assumption that the class is too broadly defined. That assumption in turn rests on the theory that an electrical contractor is not properly a member of the class unless the NEIF provision was "imposed" on the company against its will. Because the court has rejected the "imposition" or "coercion" theory in deciding the motions for summary judgment, the de-

fendants' numerosity arguments must be rejected as well.

B. *Commonality*

The defendants do not seriously contest the plaintiffs' claim that there exists at least one question of law or fact common to all members of the class. The court finds that at a minimum, all those members would have to prove whether the defendants conspired and agreed to fix, maintain and stabilize the price of contracts with the IBEW. That finding is sufficient to satisfy the commonality requirement of Rule 23(a)(2). *In re Independent Gasoline Antitrust Litigation, supra*, 79 F.R.D. at 557; *In re Toilet Seat Antitrust Litigation*, 1976-1 Trade Cases ¶ 60,915 at 69,002-03 (E.D.Mich.1976).

C. *Typicality*

The substance of this requirement, and the extent to which it is distinguishable from the provision of Rule 23(a)(4) regarding adequacy of representation, are both somewhat ill-defined. Although the two requirements certainly overlap, the typicality inquiry is broader and less exacting. Judge Thomsen of this court, sitting by designation in the Western District of Oklahoma, described the typicality requirement as follows:

> The requirement of Rule 23(a)(3) is that the claim of the representative parties be "typical" of the claims of the class, and that Rule 23(a)(3) does not require that the claims of the class representatives be "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class.

In re Four Seasons Securities Laws Litigation, 59 F.R.D. 667, 681 (W.D.Okl.1973), *rev'd on other grounds*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034, 95 S.Ct. 516, 42 L.Ed.2d 309 (1974); *American Finance Systems, Inc. v. Harlow*, 65 F.R.D. 94 (D.Md.1974). *See also Smith v. B. & O Railroad Co.*, 473 F.Supp. 572, 581 (D.Md. 1979). The requirement has also been defined as the third in a series of questions posed by Rule 23(a): (1) Who are the proposed class? (2) What are the claims of the class? (3) *What is the individual claim of the class representative?* (4) Who is the representative? 3B *Moore's Federal Practice* ¶ 23.06-2 at 23-191 to 92. Under that approach, "[a]ny inquiry into the typicality under Rule 23(a) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class." *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975).

The claims of the class members are that the defendants conspired to fix, maintain and stabilize the price of contracts with the IBEW, and consequently raised the cost of doing business in the electrical contracting industry, all in violation of § 1 of the Sherman Act. The class members all allege that the conspiracy arose out of the same set of circumstances. The class representatives, Foley and Commonwealth, have set forth claims identical to those of the class members. The requirement of typicality is therefore met.

D. *Adequacy of Representation*

The inquiry under subpart (a)(4) of Rule 23 is usually divided into two prongs: (1) whether there are conflicts of interest between the class representatives and the class members in connection with the subject matter of the litigation; and (2) whether the class representatives' counsel are competent to conduct the litigation on behalf of all class members. 3B *Moore's Federal Practice* ¶ 23.07[1] at 23-202 to 03; *Lewis v. Capital Mortgage*

Investments, 78 F.R.D. 295, 302 (D.Md.1977); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1101, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

The second of those two prongs is the more easily satisfied here. All counsel have expressed the highest confidence in and respect for the inherent competence and ability of the attorneys for Foley and Commonwealth. However, the defendants have expressed some concern that the record in this case shows plaintiffs' counsel to have been dilatory and less than vigorous in their prosecution. The court agrees that in the earlier stages of the case, the plaintiffs appeared to have great difficulty in defining their claims and carrying them forward. Nevertheless, the record as a whole, especially in light of the oral arguments on the motions decided today, demonstrates that the plaintiffs' attorneys are vitally interested in pursuing the litigation to its conclusion, for the benefit of all the class members. The work of all counsel in briefing and arguing the motions being decided today has been exemplary in that respect.

The only real question on the issue of adequate representation is therefore whether Commonwealth and Foley are appropriate class representatives. The courts have identified two principal criteria to be considered in connection with that part of the Rule 23(a)(4) analysis. First, the proposed class representatives must show that their interests are coextensive with those of the class members to such a degree that the representatives will vigorously prosecute or defend the class's interests. Second, the proposed class representatives must show that they have no interests which are antagonistic to those of the class members. 3B *Moore's Federal Practice* ¶ 23.07[2] at 23-219; *Smith v. B & O Railroad Co.*, *supra*, 473 F.Supp. at 580; *Lewis v. Capital Mortgage Investments*, *supra*, 78 F.R.D. 295. In the court's view, Foley and Commonwealth have satisfied both those criteria.

In challenging the adequacy of Foley and Commonwealth as class representatives, the defendants cite six principal conflicts of interest between one or both of the two corporations and the rest of the class members. The first alleged conflict arises from the fact that since this suit began, both Foley and Commonwealth have signed a total of at least three Letters of Assent "A" authorizing certain local NECA chapters to act as the corporations' collective bargaining agents with the corresponding IBEW locals. According to the defendants, Foley and Commonwealth have bound up their business interests with the success of their agency relationship with NECA. The court is not persuaded that that is true. In the first place, the plaintiffs assert that the creation of the agency relationship through the signing of Letters of Assent "A" rather than "B" was an inadvertent aberration from Foley's and Commonwealth's usual policies. Even if the class representatives intentionally authorized NECA chapters as their collective bargaining agents, the two corporations' interest in signing Letters of Assent would not dilute or conflict with Foley's and Commonwealth's interest in procuring the benefits that would accrue to them if the defendants were found guilty of an antitrust violation and the NEIF were invalidated. The record simply does not support the idea that either corporation would diminish its opposition to the NEIF in order to preserve its limited agency relationships with a very few NECA chapters.[24]

The second alleged conflict of interest stems from the fact that the defendants have lodged counterclaims against Foley and Commonwealth. The defendants argue that the posture of the case makes the class representa-

[24] It is interesting to note that some of the defendants contend Foley's and Commonwealth's interests are not representative of those of the class because the corporations have no stake in successful agency relationships with local NECA chapters. Defendants' (except IBEW and Pillard) Memorandum in Opposition to Motion for Determination of this Suit as a Class Action, at 53-54.

tives more likely to settle, at the expense of the class members' interests. Although the court has been watching closely, there has not been even a glimmer of an indication that Foley or Commonwealth seeks settlement. Absent a more specific showing than the defendants have made, the court is unwilling to adopt the idea that the mere filing of a counterclaim renders the counterclaim-defendant an inadequate representative of the plaintiff class.

The third alleged conflict applies only to Commonwealth, and is supposedly inherent in the company's corporate structure. Two wholly-owned Commonwealth subsidiaries are members of NECA. The defendants argue that the subsidiary companies' business interests are therefore "bound up with the activities and fortunes of [NECA]," Opposition of IBEW Defendants to Plaintiffs' Motion for Determination of This Suit as a Class Action at 32, and that the parent company's interests are in turn tied to those of NECA. The court cannot see how such an interrelationship creates a factual conflict of interest for purposes of Rule 23. As the defendants acknowledge, Commonwealth as a whole is and was sufficiently independent of NECA to be able to terminate its membership in the association when the NEIF took effect. In the court's view, that action is far more revealing of the alignment of Commonwealth's interests than is the continuing NECA membership of two of the corporation's subsidiaries.

The fourth alleged conflict is closely related to the third in that it arises out of Commonwealth's corporate structure. Commonwealth's parent corporation, C/E Construction Company, is what is known as a "double-breasted" organization: within its corporate family are both union and non-union electrical construction companies. Because the complaint alleges that the defendants' illegal practices placed class-member (union) contractors at a competitive disadvantage with respect to non-union

contractors, the defendants argue that the non-union companies within C/E Construction Company stand to gain from the effects of the NEIF, and that Commonwealth's membership within the same corporate family disqualifies it as an advocate of a class of union contractors. The court does not find that logic convincing. Commonwealth's union status and its interest in invalidating the NEIF are closely aligned with those of the class members. There is no evidence that the parent corporation, C/E, would rather perpetuate the NEIF-generated advantage of its non-union subsidiaries than eliminate the NEIF-generated disadvantages of its union subsidiaries. Similarly, there is no indication Commonwealth would sacrifice its own interests in order to further those of a non-union sister corporation. The alleged conflict of interest is therefore purely speculative.

The fifth alleged conflict stems from the difference in size between Foley and Commonwealth on the one hand, and the majority of the class members on the other. The defendants argue that "large travelling contractors who enter an area for a single project, hire electricians, complete the job, and leave, perhaps forever," NECA Defendants' Opposition Memorandum at 54, do not share and cannot represent the interest of smaller, less transient contractors who have a greater stake in preserving good will with the local unions. The defendants cite the lack of antitrust actions brought by smaller companies as evidence that those companies do not share Foley's and Commonwealth's interest in challenging the NEIF. As the plaintiffs point out, however, the lack of parallel lawsuits could just as easily be attributed to the smaller companies' inability to afford lengthy litigation, or their reluctance to antagonize the IBEW directly, in their own names. Whatever the size of the company, each has an interest in avoiding being victimized by an illegal price-fixing scheme, and Foley's and Commonwealth's size and resources make the two corporations more rather than less appropriate as class representatives.

The Sixth and final alleged conflict of interest arises from the differences in the relief sought by Foley and by the class as a whole. From the memoranda and exhibits submitted, the court understands that Foley seeks both damages and injunctive relief, as do the class members. But more importantly, the court cannot see that any differences which *might* exist would create a fatal conflict of interest. The size of Foley's economic stake in the outcome, when viewed in terms of what the corporation would be obligated to pay if the NEIF were found to be legal, is great enough to ensure that the corporation will be a vigorous and diligent class representative as far as proving a violation is concerned. There is no reason to suspect that Foley's vigor would diminish when the time came to collect treble the amounts paid into the fund, whether Foley's own payments were relatively small or not. Nothing in *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993, 94 S.Ct. 2406, 40 L.Ed.2d 773 (1974), or *Maynard, Merel & Co. v. Carcioppolo*, 51 F.R.D. 273 (S.D.N.Y. 1970), indicates to the court that Foley's representation of the class would be inadequate.

Because none of the alleged conflicts of interest between the proposed class representatives and the rest of the class members is significant, the court is satisfied that Foley and Commonwealth "will fairly and adequately protect the interests of the class," and the requirements of Rule 23(a)(4) are therefore met. The next issue is whether the proposed class satisfies the requirements of either 23(b)(2) or 23(b)(3).

Although the plaintiffs argue that they have met the requirements of both those subparts, the court has serious doubts as to the class's qualifications under ¶(b)(2). However, because the court agrees that all the requirements of ¶(b)(3) have been met, it will not be necessary to decide the (b)(2) issues one way or the other. Ac-

cordingly, the court will conduct only those inquiries necessary under 23(b)(3): (1) whether the issues of law and fact common to the class predominate over individual issues; and (2) whether a class action is superior to other available methods of adjudication, especially in terms of manageability. *Technical Learning Collective v. DBAG*, 1980-1 Trade Cases ¶ 63,006 (D.Md. 1979); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977).

E. *Predominance of Common Issues*

The leading case governing the predominance question in the Fourth Circuit is *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977). Sitting *en banc*, the court rejected the idea that there was "almost a rebuttable presumption" in favor of class certification in antitrust suits,[25] and set out a three-step process for determining whether the requirements of 23(b)(3) had been met.

The court first noted that in any private antitrust action, there were three essential elements to be proved: a violation of the antitrust laws, direct injury to the plaintiff caused by the violation, and the damages the plaintiff sustained. *Id.* at 65. It was therefore not enough, the court reasoned, to determine only that issues of violation were common to the class, and to conclude that common issues therefore automatically predominated. Injury and damages might be common issues if their proof were "virtually a mechanical task," "capable of mathematical or formula calculation." But if questions of injury and damages required complex, individualized proof, then the common violation issues could not be said to predominate. *Id.* at 68; *Technical Learning Collective, supra*, 1980-1 Trade Cases at 77,026. "The law of this

[25] The "rebuttable presumption" idea had been adopted in the majority opinion of the panel which originally heard the case on appeal, 539 F.2d 1016, 1021 (4th Cir. 1976).

Circuit, then, demands a searching inquiry into all three elements of an antitrust suit before the district court can actually conclude that common questions predominate over individual issues." *Id.* at 77,026. The court is satisfied that in the present case, common issues as to violation, injury *and* damages predominate over any issues requiring individualized proof.

1. *Violation*

The defendants argue that the conspiracy issues do not lend themselves to common proof because the plaintiffs will have to show that each local union and each local business agent with whom the plaintiffs dealt adhered to or otherwise participated in the alleged conspiracy. That argument is merely an extension of the theory that Article Six of the National Agreement is not illegal unless the individual local unions "imposed" it on unwilling electrical contractors. As the court has already stated, it rejects that theory. In order to establish the defendant's liability, the plaintiffs have to show:

—that the defendants entered into an agreement to fix prices

—that the purpose of the agreement was to eliminate competition

—that the commodity or service whose price was fixed is within the ambit of the antitrust laws

—that the agreement does not fall within the labor exemption to the antitrust laws

—that the agreement was the proximate cause of the injuries the plaintiffs allege.

If the plaintiffs can prove those elements, they will have established the defendants' liability as to each and every plaintiff who made payments to the NEIF,[26] whether or

[26] Liability would also be established as to those who are threatened with having to make such payments, or who were indirectly injured by having the cost of the payments passed on to them. *See* Part III, *supra*.

not the payments were the result of "coercion" or "imposition" as the defendants define it.

In that respect, the present case is distinguishable from both *Kline v. Coldwell, Banker & Company*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975), and *Trecker v. Manning Implement, Inc.*, 73 F.R.D. 554 (N.D.Iowa 1976). In each of those cases, the alleged conspiracy was among a relatively large number of independent real estate brokers or auto parts dealers. Proof of liability on the part of only some defendants could not be presumed to establish that every plaintiff had paid an illegally-fixed price. In the present case, on the other hand, the plaintiffs need prove a conspiracy between *only* NECA and the IBEW in order to support their damages claim. The issue of the other defendants' participation will not affect the plaintiffs' right to recover, as long as the plaintiffs prove the NECA-IBEW conspiracy. The elements of that proof, listed above, are common issues that predominate over any individual issues pertaining to the existence of a violation.

2. *Injury and Damages*

The second and third areas for searching inquiry under the *Windham* rule are the *fact* of injury (or the impact of the conspiracy on the plaintiffs), and the amount of damages suffered. Because they are so closely related in the present case, the court will treat them together. Once again, the defendants argue that individualized issues would predominate in the plaintiffs' showing of impact and damages, because each plaintiff would have to show how a particular union local or locals "imposed" the NEIF on the unwilling contractor. Proof of the necessary coercion would therefore require the "separate mini-trials" which *Windham* determined must preclude class certification. In support of their position, the defendants

cite several cases, notably *Ungar v. Dunkin' Donuts*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976), for the proposition that common issues do not predominate where individual coercion is at issue.

The court remains convinced that individual coercion is *not* at issue in this case. Defendants' authority consists primarily of cases dealing with illegal tie-ins; those cases do not provide much guidance in a price-fixing context. While coercion is plainly an element of tying under § 1, it is not crucial to establishing that the conspiracy between NECA and the IBEW proximately caused injury to the plaintiffs, and injury in a readily-calculable amount. On the contrary, proof of impact and damages in this case "breaks down in what may be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula calculation.'" *Windham, supra*, 565 F.2d at 68. The plaintiffs claim that the impact of the defendants' scheme is the higher cost of obtaining contracts for IBEW labor, and consequently the higher cost of carrying on the electrical contracting business as a whole. They also claim that the measure of the cost increase is the amount of the plaintiffs' NEIF payments, and is therefore readily determinable from the NEIF's records.

The defendants rebut that analysis as "simplistic," arguing that the amount of any overcharge—which is the correct measure of damages in a price-fixing case, Sullivan § 251 at 785-86; *See also Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979)—can be established only by proving what the plaintiffs would have paid for IBEW labor absent the industry fund provision. That hypothetical price, according to the defendants, is a function of so many variables in the labor-negotiation process that it cannot be the subject of common proof.

The court does not find the defendants' argument persuasive. The one per cent charge payable to the NEIF

was added onto the provisions of labor contracts already in existence in July of 1977. The parties to the National Agreement intended that it would be inserted into "all construction agreements in the electrical industry" (Article Six of the National Agreement). The amount of a particular contractor's obligation depended on both the size of its gross labor payroll and the fixed percentage determined solely by the local NECA chapter. There is no indication that the percentage or the obligation itself was meant to be negotiable, depending on the strength or location of an individual contractor.

Under those circumstances, the amount of the NEIF surcharge is for all practical purposes equivalent to the overcharge proximately resulting from the NECA-IBEW agreement. Furthermore, if the court accepted the defendants' analysis, the plaintiffs would very likely be left with no means of establishing the specific amount of their damages. Although some of the defendants suggest that the plaintiffs make individual showings of "the bargaining and economic circumstances of each local area and union," Opposition of IBEW Defendants to Plaintiffs' Motion for Determination of this Suit as a Class Action at 48, speculation about what those circumstances *would* have been absent the NEIF could hardly provide a court with a reliable basis for computing damages. As a matter of policy, an antitrust defendant should not be able to thwart any recovery against it by alleging that its own conduct "muddied the waters" to a point where the amount of overcharge became incalculable. The court has already clarified its position on that issue in Part V, *supra*, citing *e.g. Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed 652 (1946). Where, as here, there is a written agreement containing a mathematical description of the charge to be uniformly exacted, and there are records of the amounts paid pursuant to the agreement, the measure of damages need not be established by individualized proof.

Because ascertaining injury and damages to the plaintiffs is "virtually a mechanical task," common issues predominate, and the first requirement of Rule 23(b)(3) is therefore met. The only remaining question is whether the second requirement of that subpart has also been met; that is, whether class action is superior to other available methods of adjudication.

F. *Superiority of Class Action*

The court is persuaded that class action is superior to other methods of litigating this case for several reasons. First, the cost to each plaintiff of litigating its claim individually might preclude meritorious claims and dilute the deterrent effect of the Sherman Act's treble-damage provision. *Technical Learning Collective, supra.* Certifying the class with Foley and Commonwealth as its representatives will ensure that the suit will not perish solely for lack of financial resources. Second, a class action will probably have the least burdensome impact on the judicial system, a consideration the Fourth Circuit in *Windham* found to be particularly important. 565 F.2d at 70, 72. Common proof of the liability issues, and mechanical determination of damages, will permit the most efficient resolution of the controversy. Third, the court cannot foresee any serious manageability problems if the suit goes forward as a class action: the class representatives have agreed to assume the cost of notifying class members, and the NEIF records are likely to make notification a relatively straightforward (although laborious) task. Fourth, the class members do not appear to have a strong interest in pursuing individual lawsuits. As the plaintiffs noted at oral argument, the defendants themselves have argued in another context that many class members may be hesitant to sue individually, for fear of jeopardizing their continuing relationships with the IBEW. In the court's view, that possibility implies that the controversy will be litigated most thoroughly and effectively if it proceeds as a class action. *See Technical Learning Collective, supra.*

In sum, class action is superior to other methods of litigation in the present case. The plaintiffs have met the criteria of Rule 23(b)(3) as well as those of Rule 23(a), and the motion for class certification must accordingly be granted. Pursuant to Rule 23(c)(2), the court will direct that the class representatives provide individual notice to all members who can be identified through reasonable effort, and that they provide the best notice practicable to all other members.

VII. *Plaintiffs' and Defendants'* [27] *Cross-Motions for Summary Judgment on the Defendants' Counterclaims*

The essence of the NECA defendants' motion is the allegation that the plaintiffs, in refusing to pay the amounts they owed the NEIF, and in filing suit to invalidate the industry fund, engaged in an illegal boycott of the NEIF with the purpose of damaging NECA. The NECA defendants characterize the boycott, and the plaintiffs alleged conspiracy that resulted in the boycott, as a violation of § 1 of the Sherman Act. In their cross-motion, the plaintiffs seek summary judgment declaring that as a matter of law, the NECA defendants are not entitled to recover on any of their counterclaims.

In light of the court's conclusion that the plaintiffs are entitled to summary judgment on the issue of the National Agreement's illegality, it would be anomalous to conclude that the plaintiffs' refusal to pay into the NEIF was and is an illegal boycott. Even if the court were to address the merits of the counterclaims without regard to the NEIF's illegality, the court would have considerable difficulty characterizing the plaintiffs' alleged concerted action as the type of activity forbidden by the Sherman Act. But because the NEIF is illegal *per se*,

[27] As the court explained in Part I., only NECA and the NEIF trustees have filed counterclaims. The motions discussed in Part VII apply only to those defendants.

the plaintiffs' refusal to contribute to it cannot subject them to antitrust liability. Their motion for summary judgment on the counterclaims must be granted, and the defendants' must be denied.

VIII. *Summary*

The disposition of the pending motions can be summarized as follows:

(1) the defendants' motion to dismiss NCA as a plaintiff must be denied;

(2) the defendants' motion to dismiss the claims of the "indirect-hire" plaintiffs must be denied as to the § 16 claims, but granted as to the § 4 claims;

(3) the motion of defendants Colgan and Miller to dismiss the complaint as to them must be denied;

(4) the plaintiffs' motion for summary judgment on the primary claims must be granted, and the defendants' cross-motion for summary judgment on the same claims must be denied;

(5) the plaintiffs' motion for class certification must be granted; and

(6) the plaintiffs' motion for summary judgment on the defendants' counterclaims must be granted, and the defendants' cross-motion for summary judgment on the same claims must be denied.

The court will enter a separate order to that effect.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYAND

Civil Action No. HM-77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Plaintiffs

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, *et al.*,
Defendants

ORDER

The Court having issued its Memorandum Opinion in this matter on September 9, 1980, it is 10th day of October, 1980, hereby

ORDERED AND ADJUDGED, that Article 6 of the NECA-IBEW National Agreement is in violation of Title 15, U.S.C. Section 1 (Section 1 of the Sherman Act) and is hereby declared illegal as to contractors who are not members of NECA. Accordingly, it is further ordered that:

The defendants' motions to dismiss NCA as a plaintiff are denied;

The defendants' motions to dismiss the claims of Arthur G. McKee and Company, Inc., Badger America, Inc., Dravo Corporation, Stearns-Roger, Inc. and Jacobs Constructors are denied as to the Section 16 claims (Title 15, U.S.C. Section 26) and granted as to claims under Section 4 (Title 15, U.S.C. Section 15);

The motion of defendants, Colgan Electric, Inc. and Miller Electric Company, to dismiss the complaint as to them is denied;

The plaintiffs' (with the exception of Donovan Construction Co. of Minnesota, Inc.) motion for summary judgment for a declaration as specified in the "Ordered and Adjudged" paragraph above, is granted, and the defendants' cross motions for summary judgment on the same claims is denied.

Plaintiffs' motion for summary judgment on the defendants' counterclaims is granted, and the defendants' cross motion for summary judgment on the same claims is denied;

Plaintiffs' motion for class certification is granted with the class defined as follows:

> All electrical contractors which since July 1, 1977 (a) are not members of the National Electrical Contractors Association or its Chapters *and* (b) have performed electrical construction work using electrical workers obtained and employed under the terms of "Inside" or "Outside" Collective Bargaining Agreements with local unions affiliated with the International Brotherhood of Electrical Workers, AFL-CIO, which agreements contain or incorporate by reference the provisions of Article 6 of the NECA-IBEW National Agreement establishing the National Electrical Industry Fund.

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYAND

Civil Action No. HM-77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, *et al.*

INJUNCTION

By reason of the rulings contained in the Court's Memorandum Opinion dated September 9, 1980, it is this 10th day of October, 1980, by the United States District Court for the District of Maryland, hereby

ORDERED that the defendants, NECA, Colgan Electric Company, Inc., Miller Electric Company, Robert L. Higgins, IBEW, Charles Pillard, Trustees of the NEIF, H. E. Autrey, Allen Bader, Frank H. Bertke, Donald E. Cates, Robert W. Colgan, Joe R. Devish, J. D. Hilburn, Sr., Carl T. Hinote, Warren E. Losh, John Ostrow, C. W. Stroupe, Allan H. Stroupe, L. R. McCord, Aldo P. Lera, and Lowell C. Timm, their respective officers, directors, agents, employees, successors, assigns, as well as any and all other persons or entities acting under, through or at the direction of the defendants are enjoined from seeking to continue, continuing, enforcing, maintaining or renewing Article Six of the National Agreement between the International Brotherhood of Electrical Workers and the National Electrical Contractors Association dated December 8, 1976, and any amendments thereto, as to any person, corporation or other entity which is not a member

of the National Electrical Contractors Association, or from entering into, maintaining or participating in any act, contract, agreement, understanding, plan, program or other arrangement with any person, corporation or other entity which is not a member of the National Electrical Contractors Association that includes any provision implementing Article Six of the aforesaid agreement. And it is further

ORDERED that the above-mentioned defendants, their respective officers, directors, agents, employees, successors and assigns, as well as any and all other persons or entities acting under, through or at the direction of defendants are enjoined from demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund, or any alternate or substitute therefor the effect of which would be to add a surcharge, determined by a uniform formula, to the cost of procuring all contracts with the IBEW in the electrical construction industry. It is not the purpose of this Order to preclude defendants from prosecuting or defending lawsuits or administrative proceedings pending at the time of entry of this Order; nor is it the purpose of this Order to make any determination with regard to any person, corporation or entity which has entered into a settlement with the defendants.

The Court directs the defendants, International Brotherhood Electrical Workers, National Electrical Contractors Association and the Trustees of the National Electrical Industry Fund to furnish promptly to each of their local chapters, local unions, and all collection agents of the National Electrical Industry Fund a copy of this Order.

/s/ Herbert F. Murray
HERBERT F. MURRAY
United States District Judge

No. 82-1147

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, (AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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OCTOBER TERM, 1982

No. 82-1147

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, (AFL-CIO), and CHARLES H. PILLARD,
Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY MEMORANDUM

INTRODUCTION

The parties have filed with this Court a joint motion to defer consideration of the petitions for certiorari herein and in the companion cases (Nos. 82-1143, 82-1146 and 82-1147) pending a notification from the District Court as to whether the parties' Settlement Agreement will be approved. Such approval is required because the instant suit was filed as a class action. The Agreement, as the motion states, is conditioned upon this Court's deferral of the petitions for certiorari; any action by this Court on those petitions would alter the *status quo ante* and thereby affect the decision of the class members as to whether they should accept or reject the settlement. Moreover, and equally obviously, avoidance by the parties of the respective risks of a grant or denial of certiorari

motivated their willingness to settle. Accordingly, the public interest in the settlement of litigation would be served by the granting of the motion and the deferral of consideration of the petitions. We file the instant Reply Memorandum not in order to deviate in any respect from the prayer of the aforementioned joint motion, but only out of an abundance of caution, having been advised by the Clerk's Office that the petitions and the briefs in opposition have been submitted to the Court for consideration simultaneously with the joint motion.

ARGUMENT

I. THE *PER SE* ILLEGALITY QUESTION.

A. Respondents dispute (Resp. Br. 23)[1] our submission (Pet. 13-18) that the decision below conflicts with this Court's holding in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 ("CBS"). Respondents' attempted distinction of *CBS* is plainly without merit. They say:

> Here, the basis of the decision below is that the union combined with NECA to raise the prices paid by another group of competitors. In *CBS*, there was no allegation that the composers or ASCAP or BMI had combined with the *competitors* of CBS to raise CBS's prices. In the instant case, the IBEW agreed with plaintiffs' and class members' competitors to attempt to secure the 1% surcharge. This basic difference renders the *CBS* case inapposite. [Resp. Br. 23, emphasis in original]

The first sentence of the foregoing is accurate, in that defendants are charged with seeking to require non-

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[1] "Resp. Br." will refer to Respondents' Brief in Opposition to the Petitions in Nos. 82-1146 and 82-1147. "Pet." will refer to the Petition for a Writ of Certiorari filed by IBEW, *et al.* in No. 82-1147.

members of NECA to pay for the services of NECA.[2] But in their next sentence respondents quite simply misstate the facts of *CBS*. As this Court observed, BMI is "owned by members of the broadcasting industry,". CBS itself had been "a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959." (441 U.S. 5, text and note at n.4). Thus, BMI is a combination of "the competitors of CBS", whose action raised CBS' prices for music, just as NECA is a combination of contractors (its members) who, on respondents' theory, "attempt to secure the 1% surcharge" from their competitors, the nonmembers of NECA. What respondents say is the "basic difference" between this case and *CBS* is, in fact, an additional point of identity.

B. Moreover, respondents ignore the *St. Louis Terminal Railroad Association* and *Realty Multi-List, Inc.* cases, discussed at Pet. 20, which held it to be lawful for one group of competitors to charge another group of competitors for beneficial services. In those cases, as here, the agreements reduced free rider problems and thereby incerased competition (see Pet. 18-20). Respondents do contend that the 1% payment of NEIF "has no relationship to the elimination of 'free riders'" (Resp. Br. 20, upper case omitted). But the courts below did not decide this case on the basis that the 1% payment to

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[2] Even that sentence is sufficient to show that this case differs materially from the classic horizontal price-fixing arrangements wherein competitors agree to eliminate competition concerning the price which each will charge *to his own customers*, as in the cases on which respondents rely (Resp. Br. 14-17, 18-19). For example, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, the competing doctors established the prices which they would charge patients for medical services; in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, the wholesalers of beer agreed to deny credit to their retail customers; and in *United States v. General Motors, Inc.*, 384 U.S. 127, the automobile dealers conspired to eliminate competition from dealers who cut the prices charged to the purchasers of automobiles. In contrast, the NECA/IBEW National Agreement did not set prices to be charged by the contractors to their customers in the market for electrical construction services.

the NEIF exceeded the benefit actually received by non-NECA members. The reason is that the plaintiffs' theory was that they could not lawfully be required to pay *anything*, even though they benefitted from, for example, NECA's collective bargaining services. It was that position which the District Court and the Court of Appeals approved under their *per se* antitrust illegality theory, despite Judge Halls' protest in dissent against the unfairness of "the majority's ruling [that] although both assenting and non-assenting NECA contractors would continue to enjoy the benefits of NECA's bargaining, neither can be required to contribute to the fund." (Pet. App. 22a). See also *Williams v. ITT Grinnell Industrial Piping, Inc.* (E.D. Va.) reprinted at pp. 121a-125a of the Petition for Certiorari in No. 82-1146.

Respondents say, "defendants seem unable to comprehend that plaintiffs and class members do not want to belong to NECA and pay NECA dues." (Resp. Br. 21). But the agreement which the courts below struck down did not require the respondents either to belong to NECA or to "pay NECA dues". The real point is that respondents wish to get the benefits of NECA's services, without paying therefor. Even if, as respondents *now* contend, 1% is too high a charge for the "ride", the antitrust laws do not entitle them to have it for "free" under a *per se* theory of illegality. If the antitrust laws are applicable at all, the relief to which respondents are entitled would properly be determined after a trial at which they would have the burden of proving the amount of the overcharge, and under a rule of reason inquiry, any adverse impact on competition.[3] Respondents' heavy

[3] The situation of the non-NECA contractors who were not parties to a local NECA Chapter agreement (Resp. Br. 21) (the non-assenters) is not relevant to the issues in this case. There is no evidence that any of them have made the 1% payment to NEIF. Moreover, as respondents acknowledge, "the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of the Local NECA Chapter—Local IBEW Union Local Agreements" (Resp. Br. 5).

reliance on *FMC v. Pacific Maritime Ass'n.*, 435 U.S. 40 (Resp. Br. 22; see also *id.* at 16-17), is misplaced. The Court decided only that the agreement there was not exempt from the antitrust laws; it carefully observed that "it is clear that denying the exemption does not mean that there is an antitrust violation" (435 U.S. at 61; see also Pet. 26).

C. Respondents say, "Where an agreement interferes with price competition between competitors, it is *per se* an unreasonable restraint of trade, even if the effect upon prices is indirect." (Resp. Br. 18). That statement is unexceptionable, but begs the critical question of whether the NECA/IBEW agreement "interferes with price competition" as that concept has been understood in this Court's decisions, such as those cited at Resp. Br. 18. The answer to this question is that the record does not show *any* impact by the agreement on prices in the market for electrical construction services. See p. 3, n. 2, *supra*. Our contention is not, as respondents would characterize it, "that the raise in costs represented by the NEIF was reasonable, a contention which is immaterial in a price fixing case" (Resp. Br. 19), but rather that this case is not a "price-fixing" case. (Pet. 13-24). Thus, the present relevance of *Hanover Shoe v. United Shoe Machinery*, 392 U.S. 481 (Resp. Br. 19) is not that it is "immaterial" (*id.*) *in awarding damages under § 4 of the Clayton Act* whether costs imposed by an illegal agreement are pasesd on, but rather that the Court so held precisely because it rejected the theory that a change in costs at one level necessarily reflects a change in price at the next level (see Pet. 23).

II. THE ANTITRUST-LABOR LAW QUESTION

Respondents assert that the applicability of the nonstatutory labor exemption should not be considered "because it was not raised by the defendants before the Fourth Circuit. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144" (Resp. Br. 26). In *Adickes*, this Court said:

"Where issues are neither raised before *nor considered by the Court of Appeals*, this Court will not ordinarily consider them." (398 U.S. at 147, n.2, emphasis added). See also *Rogers v. Lodge*, 102 S. Ct. 3272, 3281, n. 10 (July 1, 1982). The Court of Appeals clearly considered the labor exemption issue:

> Merely, however, because establishment and maintenance of the industry fund may be a permissive subject of collective bargaining does not automatically exempt the IBEW from the provisions of the antitrust laws. [Pet. App. 18a-19a]

And, contrary to respondents, the issue was raised by the defendants below.[4] Indeed, defendants relied heavily on a prior Fourth Circuit decision (*Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d (C.A. 4), *cert. den.* 449 U.S. 870) which required proof of a predatory intent to establish a *Pennington*[5] violation, as did the decisions from the Fifth, Sixth and Seventh Circuits cited at Pet. 25-26. Respondents do not address the conflict between those decisions and that of the court below herein.

Moreover, respondents misread *Pennington* in a material respect when they say that the Court there "stated that neither labor law nor labor policy supports a union bargaining with one *group* about what it will seek from another *group*." (Resp. Br. 29, emphasis added). See also *id*: "* * * the union is not free to negotiate with one employer concerning the terms it will request from another." What *Pennington* actually ruled is that:

> there is nothing in the labor policy indicating that the union and the employers *in one bargaining unit* are free to bargain about the wages, hours and working conditions of *other bargaining units or to attempt to settle these matters for the entire industry.* On the contrary, the duty to bargain *unit by unit* leads

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[4] Brief of Defendants-Appellants C.A. 4, Nos. 80-1808, 80-1809, pp. 59-60, 73.

[5] *Mine Workers* v. *Pennington*, 381 U.S. 657.

> to a quite different conclusion. [381 U.S. at 666, emphasis added)

The difference between what petitioners assert and what *Pennington* decided is critical on the facts of this case and to Congress' policy favoring the stability of multi-employer bargaining units (see Pet. 26-27).

Because industry funds have been held to be nonmandatory subjects of collective bargaining, respondents assert flatly that "the [labor] exemption would not apply" (Resp. Br. 27). However, this Court expressly reserved that issue in *Federation of Musicians v. Carroll*, 391 U.S. 99, 110. For the reasons stated at Pet. 28-29, it would be inconsistent with the national labor policy to confine the exemption to agreements concerning mandatory bargaining subjects. This issue of the relationship between the antitrust and labor laws would, even if standing alone, warrant plenary consideration by this Court.

CONCLUSION

For the foregoing reasons, if the merits of the Petition for Writ of Certiorari are reached despite the settlement agreement, the Petition should be granted.

Respectfully submitted,

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No. 82-1147

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OCTOBER TERM 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., et al.,

Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, et al.,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF AMICI NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, ARIZONA CHAPTER, MASONRY INDUSTRY PROGRAM OF ARIZONA AND PIPING INDUSTRY PROGRESS AND EDUCATION FUND FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONS AND BRIEF OF AMICI CURIAE

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MOTION OF ARIZONA TRADE GROUPS TO APPEAR AMICUS

The Masonry Industry Program of Arizona (Arizona Masonry), the National Electrical Contractors Association, Arizona Chapter (Arizona NECA),[1/] and the Piping Industry Progress and Education Fund (Arizona PIPE), all of Arizona, respectfully move for leave to file an amicus brief in this cause.[2/]

The decision of the panel of the Fourth Circuit, in a case of first impression, falls directly not only upon the parties before this Court but also the American construction industry, generally. It greatly affects the national labor policy.

Whether the decision of the panel is correct or erroneous, its enormous national importance warrants consideration by this Court of the competing antitrust and national labor policy interests.

Respectfully submitted this 3RD day of FEBRUARY, 1983.

LEWIS AND ROCA

By /S/
JOHN P. FRANK
100 W. Washington St.
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(602) 262-5311

Attorneys for Arizona NECA, Arizona Masonry and Arizona PIPE

1/ The Movant Arizona NECA is functionally a party in Grant v. Commonwealth Electric Company, HM 79-1305, in the District Court, one of the removed cases which will be controlled by this case.

2/ Movants all appeared before the Fourth Circuit below as amici in this case. Pursuant to Rule 36, written consent to the filing of the brief was sought from all parties. Written consent of the various appellants in the Fourth Circuit accompanies this motion. Appellees below have not consented.

Arent, Fox, Kintner, Plotkin & Kahn

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Donald M. Barnes
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December 9, 1982

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Lewis and Roca
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Phoenix, Arizona 85003-1899

Re: Amicus Appearance Before the Supreme Court in National Constructors Association, et al., v. National Electrical Contractors Association, et al.

Dear Mr. Pettibone:

We are counsel for Miller Electric Co. and Colvan Electric Company, Inc., two of the defendants in the above captioned litigation.

In response to your December 6, 1982 letter, please be advised that both Miller Electric and Colvan Electric consent, pursuant to U.S. Supreme Court Rule 36, to the filing of an amicus brief on behalf of your clients.

Very truly yours,

Donald M. Barnes

Donald M. Barnes

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DEC 13 1982

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December 6, 1982

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Phoenix, Arizona 85014

Re: NCA v. NECA
Case Nos. 80-1808, 80-1809
Fourth Circuit Court of Appeals

Dear Mr. Pettibone:

This will confirm our telephone conversation of today in which I indicated that the NECA defendants consent to your filing an amicus curia brief in support of our petition for certiorari on behalf of the Arizona Chapter of NECA, the Masonry Industry Program of Arizona, and the Pipina Industry Progress & Education Fund (Arizona). The petition is currently due January 7, 1983. We will send you a copy of our latest draft petition as soon as it is typed.

Very truly yours,

Guy Farmer

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RE: Amicus Appearance Before the Supreme Court in National Constructors Association, et al., v. National Electrical Contractors Association, et al.

Dear Mr. Pettibone:

We are counsel for the National Electrical Contractors Association, the trustees of the National Electrical Industry Fund and Robert L. Higgins, defendants in the above captioned litigation.

In response to your December 6, 1982 letter, please be advised that our clients consent, pursuant to U.S. Supreme Court Rule 36, to the filing of an amicus brief on behalf of your clients.

Very truly yours,

Peter H. Gunst

PHG:ms

cc: Guy Farmer, Esquire

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December 10, 1982

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Re: IBEW, AFL-CIO, et al. v. NCA, et al.
(U.S. Supreme Court)

Dear Mr. Pettibone:

In accordance with your request, please be advised that the petitioners, International Brotherhood of Electrical Workers and Charles H. Pillard, consent to your filing an amicus brief, on behalf of certain industry promotion funds in Arizona, in support of our petition for certiorari.

Yours very truly,

SHERMAN, DUNN, COHEN, LEIFER & COUNTS, P.C.

By Laurence J. Cohen

cc: Guy Farmer, Esq.
Peter H. Gunst, Esq.
James P. Garland, Esq.
Donald M. Barnes, Esq.

No. 82-1147

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BRIEF OF ARIZONA AMICI IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. Introductory Statement.

By its decision issued May 17, 1982, in this case which it characterized as one of first impression, a two-judge majority of a panel of the Fourth Circuit, over the vigorous dissent of Judge Hall, found that the collective bargaining relationships of the various parties had run afoul of the nation's antitrust laws.

More particularly, the majority concluded that the defendants illegally fixed prices in violation of the Sherman Act by establishing and maintaining, through the

collective bargaining process, an industry promotion fund. With only slight modification, the panel majority allowed the permanent injunction issued by the District Court to stand.

Others will address the merits of the panel majority's opinion in their petitions for certiorari. While amici National Electrical Contractors Association, Arizona Chapter (Arizona NECA), Masonry Industry Program of Arizona (Arizona Masonry) and Piping Industry Progress and Education Fund (Arizona PIPE), the latter quite probably being the oldest industry promotion fund in America, do not believe the panel majority reached an appropriate result, they submit that the critical issue at this juncture is whether the enormous and far-reaching impact of the panel majority's decision upon national policies warrants consideration by this Court.

II. Analysis.

A. Purposes of Industry Funds.

Industry funds sprang up in the United States about 1950. The original industry funds were based on clauses in the labor agreements which put a per hour contribution from every contractor covered by the labor agreement into a central account. The agreements were negotiated between trade associations and unions, and a considerable number of nontrade association contractors became signatories to the union agreements. These may be referred to by a variety of terms, but a common phrase is "independent signatories."

The earliest trade associations were corporations which collected funds for a variety of industry promotional subjects. An aftermath of the 1959 amendments to Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, was the wide-spread reorganization of industry funds into trusts; both Arizona PIPE and Arizona Masonry use that form. Industry funds have spread broadly throughout the

United States and now are everywhere.

The fundamental purpose of an industry fund is to promote the welfare of a particular subdivision of the construction industry. This has two aspects, external and internal. In dealing with the world at large, the fund finances matters relating to codes, counsels on industry regulation, commonly gives the bulk of its attention to product promotion, and in general maintains a public relations program. The internal aspects of a fund program are also of major importance. We are frequently looking at hordes of small businessmen, many of whom may in the relatively recent past have been working with the tools and have branched into business for themselves. Seminars on estimating, programs for increased safety, educational programs on what to do with the pre-construction conference, how to document changes, understanding the building code, informing the participants of new laws affecting the industry - all these are simple tasks, chosen from voluminous lists.

All of these things take money, and they have an overhead and administrative component. Particularly if the drive is to deal with complaints, extensive inspections for the benefit of the public may be necessary, and this takes personnel.

B. Industry Funds are Indispensable to the Construction Industry.

The widespread use of the industry funds is responsive to a felt need. They are generally useful, and particularly where small businessmen are involved, they are indispensable. The giant conglomerates in the construction industry - the national contractors who brought this action - have the resources to be able to tend to these interests for themselves. The smaller contractors would be absolutely powerless before the giants as well as before other community pressures if they could not come together in some fashion. It would be hard to imagine any more clearly anti-competitive step than seriously crimping the industry funds. Witness this action; the big

boys may not need the funds, but the little ones surely do.

These programs are sponsored in the labor agreements. They necessarily are supported by the unions or they could not exist; they would not be in the agreements. Candor requires acknowledgment that this is for two reasons. First, there may well be trade offs. The unions predominantly want welfare, pensions or vacations as fringe benefits, and the employers want the industry funds as fringe benefits; both groups have legitimate interest in securing all the fringes. There is also a much larger factor. A good industry fund is serving the interests of the whole industry and, therefore, helps either make or preserve jobs. Masonry is a good example. If, in the Sun Belt, block disappears before the onslaught of unrelated materials, there will be no masonry contractors, there will be no masonry jobs, and there will be no masonry union. We over-simplify here in the interests of dramatically making the

point, but the point is there - these are interlocked benefits in the best sense that there will not be a piece of pie for anyone in the construction industry unless there is pie available for everyone.

C. The Decision Below Will Have Grave National Consequences.

This case does not simply involve the interests of the parties or the electrical construction industry, as a whole. This case is much bigger. If allowed to stand, the Fourth Circuit panel majority's decision, whether right or wrong, will have a devastating impact upon the construction industry wherein industry promotion funds have proliferated. Hundreds and quite possibly thousands of employer associations and certainly thousands of contractors throughout the United States will be directly affected. We most urgently request that before this hurricane is finally unleashed upon the land that it have the ultimate and comprehensive views of this Court.

III. Conclusion.

In view of the extreme national consequences of the Fourth Circuit panel majority's decision, we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted this 3rd day of February, 1983.

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AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

JOHN P. FRANK, being first sworn, deposes and says that on this 3RD day of FEBRUARY, 1983, he caused to be mailed postage prepaid three copies of the Motion Of Amici For Leave To File Amicus Brief In Support Of Petitions For Writ Of Certiorari and of the Amicus Brief to:

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Forty copies of this Motion and Brief have also been filed this day with the Clerk of this Court.

/s/
JOHN P. FRANK

Subscribed and sworn to before me this 3RD day of FEBRUARY, 1983.

/s/
Notary Public

My Commission Expires:

_____